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CITATIONS

788-241—65——1

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. —

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

NEW ENGLAND ELECTRIC SYSTEM, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the Securities and Exchange Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–23a) is reported at 346 F. 2d 399. The findings and opinion of the Securities and Exchange Commission, dated March 19, 1964 (R. 1254–1282), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1965 (App. A, *infra*, p. 24a). On Sep-

tember 2, 1965, Mr. Justice Black extended the time to file a petition for a writ of certiorari to and including October 2, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 11(b)(1) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79k(b)(1), permits a registered holding company to control one or more integrated public-utility system in addition to its principal integrated system only if the Commission finds, *inter alia*, that "Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system * * *." The question presented is whether the court erred in rejecting the Commission's longstanding interpretation that, under this provision, "the loss of substantial economies" must be such as to render the additional system incapable of sound and economical operation independent of the principal system.

STATUTE INVOLVED

Section 11(b)(1) of the Public Utility Holding Company Act of 1935, 49 Stat. 820, 15 U.S.C. 79k(b)(1), provides in pertinent part:

> It shall be the duty of the Commission, as soon as practicable after January 1, 1938:
>
> (1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company

thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, * * * *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system * * *.

STATEMENT

On August 5, 1957, the Securities and Exchange Commission instituted proceedings under Section 11(b)(1) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79k(b)(1), to determine the extent to which New England Electric System ("NEES"), a registered holding company, could lawfully retain control over the electric, gas and other properties in its holding company system. The initial phase of the proceedings terminated on February 20, 1958, when the Commission held that the electric utility subsidiaries of NEES comprised an "integrated electric utility system" as defined in Section 2(a)(29)(A) of the Act, 15 U.S.C. 79b(a)(29)(A).[1] NEES elected to retain its electric system as its "single" or "principal"

[1] *New England Electric System*, 38 S.E.C. 193.

system, and the Commission proceeded to conduct hearings on the question whether its gas utility subsidiaries, which all parties agreed to consider as an "integrated gas utility system" (see 15 U.S.C. 79b(a)(29)(B)), could be retained as an "additional" integrated utility system under Section 11(b)(1).[2]

At the commencement of the gas integration proceedings, NEES controlled, *inter alia,* fourteen electric utility companies, eight gas utility companies, and a service company. Its electric companies served 824,000 retail customers in a franchise area of 4,600 square miles within the States of New Hampshire, Massachusetts, Rhode Island and Connecticut (R. 1256–1257).[3] Its gas companies provided retail service to 237,000 customers in a franchise area of 660 square miles entirely within Massachusetts. Seventy-five percent of this area was also part of the franchise area of NEES's electric subsidiaries (R. 1257). Of the twelve nonaffiliated Massachusetts gas companies which respondents selected for comparison with NEES, only one exceeded the NEES gas utility system in size of gross plant, gross annual revenues and number of customers (R. 1272, n. 24).

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[2] NEES has not contested the Commission's longstanding interpretation that an "integrated public-utility system" cannot include both gas and electric utility properties. See *Columbia Gas & Electric Corp.*, 8 S.E.C. 443, 461–463; *The United Gas Improvement Co.*, 9 S.E.C. 52, 77–83.

[3] Unless otherwise indicated, the figures used in the record are for the year ended December 31, 1958, which was the latest year for which audited financial statements were available at the time of the hearings (R. 1257).

After a full hearing, the Commission determined that the divestment of NEES's gas utility companies would not result in a loss of substantial economies to those companies within the meaning of Section 11 (b)(1)(A) (R. 1255–1280) and ordered that they be divested (R. 1280–1281). In so holding, the Commission applied the same interpretation of "loss of substantial economies" that it had applied in every other divestiture case under Section 11(b)(1):[4] *i.e.*, "such additional system cannot be operated under separate ownership without the loss of economies so important as to cause a serious impairment of that system" (R. 1262–1263). Under this test, the Commission held that, on the basis of the record before it, it was unable "to find that the gas companies could not be soundly and economically operated independently of NEES * * *" (R. 1279).[5]

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[4] A list of the holding companies which have been ordered to divest assets under the Commission's interpretation of the statutory test is included as Appendix B to this petition. For situations in which the Commission has held that "additional" systems are retainable under its construction of "substantial economies", see, *e.g.*, *North American Co.*, 11 S.E.C. 194, 243–244; *Republic Service Corp.*, 23 S.E.C. 436, 451; *Federal Light & Traction Co.*, 15 S.E.C. 675, 683; cf. *North American Co.*, 32 S.E.C. 169, 178–180.

[5] The Commission noted that NEES had attempted to sell its gas properties, as a unit, in the early 1950's. The sale was not consummated, however, because the high bidder was unable to obtain the required financing (R. 1258, 1264, n. 13). In its application for Commission approval for the sale, NEES indicated that the sale of the gas properties was proposed as a step in effectuating compliance with the integration provisions of Section 11(b)(1). See Holding Company Act Release No. 11016 (Jan. 22, 1952).

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On petition for review, the court of appeals reversed. The court's holding was not that the Commission's conclusions were unwarranted under the test which it had applied; the court based its reversal on the ground that the Commission had misinterpreted the statutory phrase "loss of substantial economies" (App. A, *infra*, pp. 6a–16a). Expressing its agreement with the dissenting opinion in *Engineers Public Service Co.* v. *Securities and Exchange Commission*, 138 F. 2d 936, 944–945 (C.A.D.C.), certiorari granted, 322 U.S. 723, vacated with directions to dismiss the petition for review as moot, 332 U.S. 788 (App. A, *infra*, p. 4a, n. 3), the court held that Section 11(b)(1)(A) "called for a business judgment of what would be a significant loss, not for a finding of total loss of economy or efficiency" (App. A, *infra*, p. 14a). In reaching this conclusion, the court rejected the Commission's view of the legislative history, which had been accepted by the Court of Appeals for the District of Columbia Circuit in *Philadelphia Co.* v. *Securities and Exchange Commission*, 177 F. 2d 720, 725. Instead it relied on language in the Act's statement of purposes, "the tenor of which was that holding companies had been found uneconomical to investors and to the public" (App. A, *infra*, p. 13a) and on its view that the Act has a "symmetry," which the Commission's interpretation destroys (App. A, *infra*, p. 14a). Finding that "on the record there could have been [a] finding in NEES's favor on the appropriate standard" (App. A, *infra*, p. 16a), the court remanded the case to the Commission.

REASONS FOR GRANTING THE WRIT

The decision below is directly in conflict with the decisions of the District of Columbia Circuit in *Engineers Public Service Co.* v. *Securities and Exchange Commission,* 138 F. 2d 936, certiorari granted, 322 U.S. 723, vacated with directions to dismiss the petition for review as moot, 332 U.S. 788, and *Philadelphia Co.* v. *Securities and Exchange Commission,* 177 F. 2d 720. It also is inconsistent with a decision of the Second Circuit and may be at variance with one of the Fifth Circuit.[6] In reaching its decision, the court below rejected the Commission's longstanding interpretation of Section 11(b)(1)(A) in favor of a reading which, we believe, is inconsistent with the basic policies of the Act. As we pointed out in our petition for certiorari, which the Court granted, in *Securities and Exchange Commission* v. *Louisiana Public Service Commission,* 353 U.S. 368, reversing on jurisdictional grounds 235 F. 2d 167 (C.A. 5), the definitive determination of the meaning of clause (A) may affect substantial utility interests in all parts of the country. Since then, the number of companies potentially affected by that determination has increased. If allowed to stand, therefore, the decision below would seriously interfere with the proper administration of Section 11, which this Court has recognized to be "the very heart" of the Act. *North American Co.* v. *Securities and Exchange Commission,* 327 U.S. 686, 704, n. 14.

[6] *North American Co.* v. *Securities and Exchange Commission*, 133 F. 2d 148 (C.A. 2), affirmed on the constitutional issue, 327 U.S. 686; *Louisiana Public Service Commission* v. *Securities and Exchange Commission*, 235 F. 2d 167 (C.A. 5), reversed on jurisdictional grounds, 353 U.S. 368.

1. In both the *Engineers* and the *Philadelphia Co.* cases, the District of Columbia Circuit expressly considered and approved the Commission's interpretation of Section 11(b)(1)(A). Like the present case, those cases involved the question whether a holding company with a principal electric utility system could retain its gas properties as an additional system. In ruling on the meaning of "loss of substantial economies" under Section 11(b)(1)(A), the court stated in the *Engineers* case (138 F. 2d at 944):

> "Substantial economies" means something different and, we think, something more than substantial savings in operational expenses. Congress could have said that the divorcement shall not be decreed if the controlling utility or the controlled utility show at a hearing that the cost to operate the latter separately from the former would be substantially greater. * * * "Substantial economies" must mean * * * "important economies." The required *importance* must relate to the healthful continuing business and service of the freed utility.[7] * * *

In *Philadelphia Co.*, the court observed (177 F. 2d at 725):

> In the Commission's view, economies are not "substantial" unless their loss "would cause a serious economic impairment of the system"

[7] The court further observed that "Congress was not so much concerned with the profit motive of utilities as with the evils that had become prevalent through combinations of utilities. It was first concerned with the wiping out of the evils which the practice of utility combinations had produced, and Congress only consented to dull the blade of its chosen weapon in proved hard cases." 138 F. 2d at 944.

> such as to "render it incapable of independent economical operation." * * * We cannot say the Commission's understanding of the term "substantial economies" is wrong. We construed it similarly in the Engineers case.

The court expressly noted in that case that its interpretation of the Act—which is the same as the Commission's—is fully supported by the legislative history (177 F. 2d at 725).[8]

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[8] The court made specific reference to the Statement of the Managers on the Part of the House accompanying the Conference Report, H. Rep. No. 1903, 74th Cong., 1st Sess. (1935), and to the remarks of Senator Wheeler, the chief Senate conferee, 79 Cong. Rec. 14479 (August 24, 1935). In pertinent part, the House Managers' statement is as follows (pp. 70–71):

> * * * Section 11 of both [House and Senate] bills * * * authorizes the * * * Commission to require a holding company to limit its control over operating utility companies to one integrated public-utility system.
>
> * * * * *
>
> The conference substitute meets the House desire to provide for further flexibility by the statement of additional definite and concrete circumstances under which exception should be made to the form of one integrated system. * * *
>
> The substitute, therefore, makes provision to meet the situation where a holding company can show a real economic need on the part of additional integrated systems for permitting the holding company to keep these additional systems under localized management with a principal integrated system.

Senator Wheeler's statement, given a few moments after the Senate had agreed to the Conference Report, was that:

> * * * the Senate conferees concluded that the furthest concession they could make would be to permit the Commission to allow a holding company to control more than one integrated system if the additional systems * * * were so small that they were incapable of independent economical operation * * *.

The decision below is directly in conflict with these decisions of the District of Columbia Circuit. That court read "substantial economies" as meaning "something more than substantial savings in operational expenses" (*Engineers*), *i.e.*, economies whose "loss 'would cause a serious economic impairment of the system' such as to 'render it incapable of independent economical operation'" (*Philadelphia Co.*). The court below, on the other hand, held (App. A, *infra*, pp. 15a, 14a) that "substantial economies" means only "economies which in ordinary business parlance and by ordinary business standards are of a substantial nature," loss of which would be "a significant loss, not * * * total loss of economy or efficiency." Indeed, the court below implicitly recognized that its decision was in conflict with *Engineers*, since it stated (App. A, *infra*, p. 4a, n. 3) that it agreed with the dissenting opinion of Judge Soper in that case.

Moreover, as the court below recognized (App. A, *infra*, p. 6a), even before its decision was rendered "there [was] no uniformity of judicial view" as to the meaning of Section 11(b)(1)(A). In *North American Co.* v. *Securities and Exchange Commission*, 133 F. 2d 148, affirmed on the constitutional issue, 327 U.S. 686, the Second Circuit, without extended discussion of the statutory interpretation issue, upheld a divestiture order which the Commission had entered on the basis of its construction of Section 11(b)(1)(A).[9] In *Louisiana Public Service Commis-*

[9] Although its opinion is somewhat ambiguous on the point, it appears that the Second Circuit accepted the Commission's

sion v. *Securities and Exchange Commission*, 235 F. 2d 167, reversed on jurisdictional grounds, 353 U.S. 368, on the other hand, the Fifth Circuit—expressly eschewing legislative history (235 F. 2d at 172)—rejected the Commission's interpretation of that provision. Ruling that "substantial economies" are "important economies," the court stated (235 F. 2d at 173):

> The question of their importance must, of course, be determined by the bearing they have on the ability of the two systems to continue in the serving of the two commodities in general demand without substantial change in policy, serving practically in the same way, making substantially the same gains, suffering substantially the same losses.

Like the decision below, the ruling in the *Louisiana* case plainly conflicts with the decisions of the District of Columbia Circuit and, in effect, is at variance with that of the Second Circuit. Indeed, although the court below cited the *Louisiana* case with apparent approval (App. A, *infra*, p. 14a), it is by no means clear that the test adopted below is the same as that propounded by the Fifth Circuit.

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interpretation. The court stated (133 F. 2d at 152): "With the Commission's ruling that 'substantial economies' means important economies and not merely something more than nominal, we are in accord." In the decision there under review, the Commission, after quoting with approval the remarks of Senator Wheeler on the conference committee version of Section 11(b)(1)(A) (see n. 8, *supra*), stated, "These remarks reinforce the conclusion that Clause (A) was intended as a significant standard to be applied only when there was a strong reason for an exception to the general policy of permitting retention of only one integrated system." *North American Co.*, 11 S.E.C. 194, 209.

The need for this Court to resolve this conflict among the circuits as to the meaning of a key provision of an important regulatory statute is underscored by the fact that the decision below rejected an administrative construction of more than twenty years' standing. As we have noted, the Commission has consistently ruled that, under Section 11(b)(1)(A), a holding company may not retain an additional integrated utility system unless it can show that such system is incapable of independent economical operation (*supra,* p. 5). Under this test, more than $2,000,000,000 in utility assets have heretofore been divested on orders of the Commission (see App. B, *infra*).

2. This Court previously granted certiorari on the issue involved here, among others, in the *Louisiana* case, *supra,* but, having disposed of that case on jurisdictional grounds, found it unnecessary to reach that issue. In our petition in the *Louisiana* case, we noted with some particularity the importance of this question with respect to the future administration of the Act. The issue remains at least as important today; indeed, the number of potential proceedings in which Section 11(b)(1)(A) might be involved has increased.

Our petition in the *Louisiana* case pointed to possible future Section 11(b)(1) proceedings with respect to Delaware Power and Light Company, a registered holding company owning and operating substantial gas properties in combination with its principal electric system; Utah Power and Light Company, a reg-

istered holding company controlling, in combination with what appears to be its principal electric system, what may well be an "additional" electric public-utility system; New Orleans Public Service Inc., a subsidiary of a registered holding company owning and operating gas and electric properties;[10] and Columbia Gas System, Inc., a registered holding company which controls gas properties in seven States, some of which may not be retailable.[11] These situations still exist. The petition in the *Louisiana* case also referred to NEES, which is the subject of the present proceedings. The protracted NEES litigation has been the only major case under Section 11(b)(1)(A) which the Commission's limited staff has been able to conduct since the *Louisiana* decision.

In recent years there have been substantial changes and improvements in the state of the art respecting the operation of electric utilities,[12] and the holding

[10] In *Middle South Utilities, Inc.*, 35 S.E.C. 1, 15, the Commission stated that, in view of the fact that the City of New Orleans had purchase-option rights which would have been lost by severance, it did not propose to take action with respect to the gas properties at that time. On March 8, 1962, however, New Orleans Public Service Inc. was informed that the Commission might reopen these proceedings. On March 26, 1962, a bill was introduced in Congress for the purpose of exempting the company from the requirements of Section 11(b)(1), and bills for that purpose have been introduced in every Congress since then. The Commission has deferred action on the matter.

[11] See *Columbia Gas & Electric Corp.*, 17 S.E.C. 494, where the Commission reserved jurisdiction, *inter alia*, as to the retainability of certain gas properties controlled by Columbia.

[12] See Federal Power Commission, *National Power Survey*, Vol. I, p. 1 (1964).

company device may be expected to be employed with greater frequency to realize economies of scale to reflect these changes and developments. For example, an application is now pending before the Commission with respect to one such proposed new holding company, Northeast Utilities.[13] If the application is approved and the proposed transactions are consummated, Northeast Utilities will register and will have three large electric subsidiaries, two of which also own and operate substantial gas properties. Also, four public utility companies in the Northwest have jointly undertaken, through a company whose voting securities will be held by them in equal portions, to construct a hydroelectric project on the Snake River. Each of the ~~held by them in equal portions, to construct a hydroelectric project on the Snake River. Each of the~~ four sponsoring companies will become a public-utility holding company required to register unless an exemption can be obtained. Two of them, Montana Power Company and Washington Water Power Company, conduct substanttial electric and gas utility operations.[14] The construction of a large generating plant in New Mexico by four public-utility companies which are not now subject to the Act is also under discussion. If this should result in a plan providing for *pro rata* holding of the common stock of a new corporation by the sponsoring companies, each of them will become a

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[13] See Holding Company Act Release No. 15306 (Sept. 15, 1965).

[14] See Holding Company Act Release No. 15026 (March 3, 1964).

holding company and, unless an exemption will be available, will be required to register. Two of the sponsoring companies, Arizona Public Service Company and Tucson Gas & Electric Company, operate gas utilities in combination with their extensive electric operations. Problems under Section 11(b)(1)(A) would have to be resolved with respect to each of the foregoing systems.

3. As we have shown, the decision below is in conflict with those of other circuits on an important issue of statutory interpretation. Furthermore, we believe, that decision is erroneous. In rejecting the relevant legislative history, on which the Commission and the District of Columbia Circuit had previously relied, the court below adopted a test which, we submit, seriously undermines the major aim of Section 11(b)(1)—limiting a holding company's "control over operating utility companies to one integrated public-utility system" (H. Rep. No. 1903, 74th Cong., 1st Sess. 70). Nor does its test—"a business judgment of what would be a significant loss"—comport with the purpose of clause (A) to provide "definite and concrete circumstances under which exception should be made to the form of one integrated system" (*ibid.*).[15] Contrary to the accepted canons of construction, the court below apparently gave no weight whatsoever to the long-standing administrative construction of Section 11(b)(1)(A). Instead, it found questionable support in

[15] The court's subjective test is also incompatible with the congressional aim of encouraging voluntary divestiture. See Section 11(e) of the Act, 15 U.S.C. 79(e); H. Rep. No. 1903, *supra*, at 70; S. Rep. No. 621, 74th Cong., 1st Sess. 13.

what it perceived to be the "symmetry" of the statute.[16] But, as is often the case, the statute involved here is comprised of language drafted in the House, the Senate and in conference. There is no indication that "symmetry" is important or even relevant. Cf. *United States* v. *Mosley*, 238 U.S. 383.

4. Review of this issue is appropriate at this time and should not await the administrative proceedings on remand. If the Commission were there to determine that the gas properties are retainable under the First Circuit's test, there would be no possibility of the substantive issue being raised in this Court. On the other hand, should the Commission find the

[16] As part of its "symmetry" analysis, the court noted that the term "substantial economies" appears in the definition of "integrated gas utility system" in Section 2(a)(29)(B), 15 U.S.C. 79b(a)(29)(B), and that the Commission accepted its staff's acquiescence in NEES's contention that its gas companies comprised such an integrated system (App. A, *infra*, p. 12a; See R. 23–24, 46–47, 49, 772, 1256). The court then stated that "the Commission could not, either in good conscience or in law, accept as a concession a matter so fundamental, not only to the present proceedings, but for the future, if it were contrary to the fact" (App. A, *infra*, p. 12a, n. 8). The court's suggestion that the Commission may be deemed to have adjudicated an issue which, because of the mutual agreement of the parties, was not put before it for decision is wholly unwarranted. Moreover, the court's statement is contrary to the salutary practice in administrative proceedings of encouraging the parties, so far as possible, to narrow the issues to be considered by the agency. See, *e.g.*, Sections 5(a) and 7(b)(6) of the Administrative Procedure Act, 5 U.S.C. 1004(a), 1006(b)(6). If certiorari is granted, we intend to urge that this Court expressly disapprove any suggestion in the opinion below that agencies are not free to accept issue-narrowing concessions and stipulations.

gas properties non-retainable, even under the test set forth by the court below, it is not at all clear whether this Court would consider at that stage the question of the appropriate standard to be applied. Moreover, the administrative proceedings on remand would in no way clarify or sharpen the important statutory issue that this petition presents. In such circumstances this Court has indicated that it will review even an interlocutory decision which involves an issue "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.* 323 U.S. 373, 377; *Land* v. *Dollar,* 330 U.S. 731, 734, n. 2.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1965.

APPENDIX A

United States Court of Appeals for the First Circuit

No. 6332

NEW ENGLAND ELECTRIC SYSTEM ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

ON PETITION FOR REVIEW OF AN ORDER OF THE SECURITIES AND EXCHANGE COMMISSION

Before ALDRICH, *Chief Judge*, SWEENEY, *Chief Judge*, and WYZANSKI, *District Judge*.

John R. Quarles, with whom *Richard B. Dunn*, *Richard W. Southgate*, *John J. Glessner, III*, and *Ropes & Gray* were on brief, for petitioners.

David Ferber, Solicitor, with whom *Phillip A. Loomis, Jr.*, General Counsel, *Ellwood L. Englander*, Assistant General Counsel, *Martin D. Newman*, Attorney, and *Solomon Freedman*, Director, Division of Corporate Regulation, Securities and Exchange Commission, were on brief, for respondent.

OPINION OF THE COURT

June 4, 1965

ALDRICH, *Chief Judge*. This is a petition seeking to review and set aside a divestment order of the Securities and Exchange Commission pursuant to sec-

tion 11(b)(1) of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79k(b)(1), requiring the petitioner, New England Electric System (NEES) to dispose of its gas utility properties by terminating its relationship with its eight subsidiary gas companies. The ultimate question in the case, which the Commission resolved against NEES, was whether divestiture would cause the loss of "substantial economies" within the meaning of the cited section.

Briefly, NEES is a registered holding company controlling, at the time of the hearing, fourteen electric utility subsidiaries and eight gas subsidiaries, with some 824,000 retail electric customers in the states of New Hampshire, Massachusetts, Rhode Island and Connecticut, and some 237,000 retail gas customers in Massachusetts. Seventy-eight percent of its gas customers are also served by the electric companies. Except for certain peaks and emergencies the gas distributed is natural gas supplied by pipe line companies from the southern United States. The gas companies have separate offices and management, but their top officers are responsible to the top officials of NEES. There was a lengthy hearing before an examiner at which NEES sought to show that the cost of divestment to the electric system would be $804,000 annually, and to the gas system, if operated as a single unit after severance, $1,098,000.[1] The Commission held, *inter alia,* that the financial effect upon the electric system was not a relevant inquiry, but that if it was it was not significant. This we do not reach. It also held, which we do reach, that the claimed fi-

[1] NEES' actual figure was $1,165,000, but the Commission reduced this by $67,000 as a result of a "revised basis of payments" authorized by it. NEES does not presently dispute this adjustment, but points out that the reverse adjustment must be made to the estimated electric system losses.

nancial consequences to the gas system were not substantial as it construed the statute, but that if they were they had not been adequately proven.

Basic to its decision, as the Commisssion recognized at the outset of its opinion, is the meaning of the Act and the standards which it imposed. Briefly, section 11(b)(1) required divestiture unless NEES could satisfy the provisos or exceptions [2] contained in subparagraphs, or clauses, (A), (B) and (C). Clauses (B) and (C) were admittedly met. Clause (A) reads as follows:

> (A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

Before considering whether the Commission's interpretation of this clause was correct we must determine what its interpretation was. At the beginning of its opinion the Commission stated that to prevent divestiture NEES must show,

> that the additional systems were integrated in nature and "were so small that they were incapable of independent economic operation" and had a "real economic need" for management together with the principal system. Congress was aware that some loss of economies would usually result from the separation of jointly controlled utility systems, but considered that continued joint management should be permitted only where separation would entail a loss of economies which would be sub-

[2] The Commission uses the word "exceptions," and criticizes NEES' word "provisos." NEES' distinction, as we read it, was in response to a heavy burden of proof which the Commission sought to attach to exceptions. See fn. 4, *infra*.

> stantial in the sense that they were important to the ability of the additional system to operate soundly. [Footnotes omitted.]

The Commission then quoted at length from a decision by the Court of Appeals for the District of Columbia,[3] from which it drew the conclusion that clause (A) required a "showing by clear and convincing evidence[4] that such additional system cannot be operated under separate ownership without the loss of economies so important as to cause a serious impairment of that system." Lastly, at the end of its opinion, the Commission concluded that on the record it was unable "to find that the gas companies could not be soundly and economically operated independently of NEES, even assuming the validity of * * * [its] estimates."

Thus the statutory phrase, "cannot be operated as an independent system without loss of substantial economies," was said to mean, "incapable of independent economic operation;" "important to the ability * * * to operate soundly;" "so important as to cause a serious impairment of that system;" and "could not be soundly and economically operated."

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[3] *Engineers Public Service Co.* v. *S.E.C.*, 138 F. 2d 936, 944 (1943). This case is extensively relied on in the Commission's opinion without noting that certiorari was granted, 322 U.S. 723 (1944), and the decision subsequently vacated as moot. 332 U.S. 788 (1947). This omission was remedied in its brief. We do not know whether the view of the majority, or the dissent of Judge Soper which accords with ours, would have ultimately prevailed.

[4] The Commission has been criticized before for using this phrase, the court allowing it to pass, however, on the ground that it meant no more than the fair preponderance of the evidence, the ordinary burden of proof. *Philadelphia Co.* v. *S.E.C.*, D.C. Cir., 1949, 177 F. 2d 720, 725. We do not agree.

In *Middle South Utilities, Inc.*, 35 S.E.C. 1, 11 (1953), its most recent decision cited in its opinion for the support of its interpretation, the Commission ordered a divestment because it had not been shown that it would "cause the serious economic impairment of the system *or* that the gas properties could not operate effectively and efficiently under separate ownership." [Italic supplied.] Since presumably the Commission did not intend to voice simultaneously two different standards we read the word "or" as introducing an explanation or equivalency. Essentially this second *Middle South Utilities* phrase is the sole standard that the Commission adopts in its brief before us.

Also may be noted the Commission's statement, in refutation of one of NEES' contentions, that "other independent gas utility companies in the state * * * nevertheless have been able to conduct their operations and, apparently, earn a fair return without the alleged advantages of common control with electric utilities by a holding company."

Taking the record as a whole we find its brief accurate, and that the Commission's interpretation is

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This phrase has a well recognized meaning, and is applied in special cases, such as fraud, *Lackawanna Pants Mfg. Co.* v. *Wiseman*, 6 Cir., 1943, 133 F. 2d 482, 486, or mistake, *Philippine Sugar Estates Devel. Co., Ltd.*, v. *Philippine Islands*, 1918, 247 U.S. 385, 391, as applied in *Aetna Ins. Co.* v. *Paddock*, 5 Cir., 1962, 301 F. 2d 807, 811. The Commission is to be criticized for continuing to use this language, which by its tone suggests to laymen, as well as to lawyers, a heavy burden. We suspect, from other statements in its opinion, that it accurately revealed the Commission's approach. If so, in any future proceedings the Commission should readjust its receptivity as well as its phraseology.

that a loss is not "substantial" unless it would render impossible "economical or efficient operation." [5]

As to the correctness of this interpretation we have not considered before the meaning of clause (A), and there is no uniformity of judicial view elsewhere. It is true that in *North American Co.* v. *S.E.C.*, 1946, 327 U.S. 686, 696–7, the court referred to section 11(b)(1) as permitting retention only of "relatively small [companies] * * * unable to operate economically under separate management without the loss of substantial economies * * *." This was a passing summary, and did not purport to be an exact characterization. The precise meaning was not relevant to the constitutional questions then under consideration, and even if the court's language is not considered ambiguous we do not take it as an attempt to resolve possibly intricate questions of construction. We turn, therefore, to other considerations.

Although we do not regard the legislative history as determinative, we begin there as the Commisison makes much of it. Its principal reliance is upon the concluding remarks of Senator Wheeler on the floor after the bill had finally passed both branches. Senator Wheeler stated, *inter alia,* that the act permitted a holding company to retain more than one integrated system only when the additional systems "* * * were so small that they were incapable of independent

[5] NEES suggests there is no practical difference between preventing economical operation and bankruptcy. The Commission does not address itself to this question. We assume it believes there to be a difference, but except to the extent suggested in fn. 7, *infra*, we cannot find from its opinion what the difference is, or, more important, what is the standard by which uneconomical operation is determined. The very serious problem which this would present we do not reach because we disagree with the Commission's basic interpretation.

economical operation." 79th Cong. Rec. 14479 (Aug. 24, 1935). We may note, at the outset, that only by a most generous interpretation is this statement part of the legislative history. Having come afterwards, it could not have affected the voting. The best reason for considering it as evidence of Congressional intent, see *United States* v. *United Mine Workers,* 1947, 330 U.S. 258, 279–80; *Duplex Printing Press Co.* v. *Deering,* 1921, 254 U.S. 433, 477; *cf. State Wholesale Grocers* v. *Great Atlantic & Pacific Tea Co.,* D.C.N.D. Ill., 1957, 154 F. Supp. 471, 485, *rev'd on other grounds,* 258 F. 2d 831, *cert. den.* 358 U.S. 947, is accordingly absent.[6] Furthermore, coming from the leading Congressional advocate of strict separation, see *e.g.,* 79 Cong. Rec. 1525, Feb. 6, 1935; *id.,* 4903 (radio address of April 2, 1935); *id.,* 14470, Aug. 24, 1935 (remarks of Senator Norris), it would seem natural to regard it, at that stage of the proceedings, as a self-serving declaration. To the cynically minded it would seem to have been merely a post-contest attempt to raise the score, recapture what had been lost in the compromise with the House discussed *infra,* and to serve, just as is now being sought, to influence subsequent history. The best that should be said for

[6] See Hart and Sacks, The Legal Process: Basic Problems in the Making and Application of Law (tent. ed. 1958) 1285:

"The views of individual members of the legislature as to the meaning of a statute which were not officially communicated to the legislature prior to its enactment are not competent to be considered in determining the meaning which ought to be attributed to the statute."

Nor could it have invited a presidential veto, since the President was a known advocate of a strong bill. See 79 Cong. Rec. 3425–26, 3469–70, March 12, 1935 (Message to Congress); *id.* at 9042, June 11, 1935 (letter to Senator Barkley and Senator Wheeler); *id.* at 14164, Aug. 22, 1935 (letter to Representative Rayburn).

Senator Wheeler's statement under these circumstances is that it is not to be given the weight to which it might have been entitled if made at another time.

The other pieces of legislative history related in the Commission's brief are a quotation from remarks by Representative O'Connor speaking "of 'a little power plant in Florida' or 'a little plant in Oklahoma' (79 Cong. Rec. 14168, Aug. 22, 1935)" and one from Representative Cooper, "who had opposed the motion, [and] had referred to systems retainable under Clause (A) as 'unprofitable companies * * * too weak to stand alone' (*id.* at 14165–14166)." Examination of Representative O'Connor's full statement rebuts the economic implication the Commission wishes us to attach to the word "little." It is evident that the remarks were addressed to geographical aspects, the absentee landlordism condemned in clause (B). It is true that Representative Cooper was speaking of clause (A). But it seems apparent that as an opponent of the bill he was strategically engaged in blackening it. According to him the compromise was no compromise whatever, a position demonstrably unsound. His interpretation of particular clauses must be read in that light. *Labor Board* v. *Fruit & Vegetable Packers & Warehousemen, Local No. 760*, 1964, 377 U.S. 58, 66.

A much more pertinent characterization of the phrase "substantial economies" is found in the statement of the House Managers attached to the conference report recommending passage of the compromise draft, that the retention of additional systems was to be permitted where there was a "real economic need." H.R. Rep. No. 1903, 74th Cong., 1st Sess., 71. This language, however, is itself ambiguous. Obviously there would be a real economic need to prevent

a loss that would preclude efficient or effective operation. But there could also be said to be a real economic need to avoid any truly sizable financial loss notwithstanding the utility's ability to absorb it and remain efficient in some absolute sense.' For reasons we now come to we believe the statute is to be given this more general meaning.

The declaration of legislative objectives is found in section 1(b). Subsection (1) thereof concerns improper accounting practices, capitalization, etc., that may injure investors. Subsection (2) refers to excessive charges and other effects of transactions among companies within a holding company system. It also, together with subsection (3), refers to impediments occasioned by the holding company device to state regulation. We quote in full the remaining subsections, which declare the public interest to be adversely affected,

> (4) when the growth and extension of holding companies bears no relation to *economy of management and operation* or the integration

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[1] We have already commented upon the Commission's failure to enunciate any standard beyond this broad generalization of economy or efficiency. See fn. 5, *supra*. Possibly its views are partly implied by the points made in its opinion when assuming that an annual loss of $1,098,000 had been adequately established. The first was that while this amount is larger, absolutely, than losses required to be accepted in any previous case, it is not larger relatively. Secondly, that the loss would be only 23.98% of gross income, and 29.94% of net income before federal income taxes. (The word "only" is ours.) Third, that there are "other independent gas utility companies in the state which nevertheless have been able to conduct their operations and, apparently, earn a fair return * * * and * * * compete effectively. * * *" Finally, that it "would be entering the realm of speculation at this time to assume that rate increases would ensue from severance."

> and coordination of related operating properties; or
>
> (5) when in any other respect there is *lack of economy of management and operation* of public-utility companies *or lack of efficiency and adequacy of service* rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital. [Italic supplied.]

Pausing here we note in the italicized phrases two concepts, economy of management and operation, and efficiency (and adequacy) of service. The word "or" in clause (5) is clearly used in the disjunctive. This separate meaning is emphasized when we come to section 11(b)(1) clauses (A) and (C), *infra*. It will be sufficient to note here, for both present and future purposes, that the Commission has taken the word "efficient" from this use in connection with service and joined it with the phrase "economy of management and operation," and has then built out of the combination the concept that until a loss of economy and efficiency is shown to be total there has been no loss of substantial economies under clause (A) within Congressional concern. We may note, also, an omission which we take seriously, that on the sole occasion that the Commission quoted clause (4) it substituted asterisks for the phrase we have italicized, and, although the legislative meaning of economies is the specific matter under consideration, has never referred to it. Clause (5), likewise, is never mentioned.

The definitions of "integrated public-utility systems" are found in section 2(a)(29). Subsection (A) defines an integrated electric system as one which, *inter alia*, "may be economically operated as a single interconnected and coordinated system." Subsection (B) defines a gas system as where, *inter alia*, "substantial

economies may be effectuated by being operated as a single coordinated system." During argument we inquired the reason for this difference. No suggestion was forthcoming. The only reason apparent to us is that in order for electric companies to constitute an integrated public utility system they must meet a technical requirement not applicable to gas companies seeking to qualify as an integrated system. Unlike gas companies, *General Pub. Util. Corp.*, 1951, 32 S.E.C. 807, 834–35, electric companies must be "physically interconnected or capable of physical interconnection." Where this requirement is met, so that actual interchanges of power could be made to meet power requirements at different points in the system, it was enough for Congress that the system as a whole "may be economically operated as a single interconnected and coordinated system." Assuming the other qualifications were met electric companies would not have to prove that system ownership would be cheaper than independent ownership, probably because this could safely be assumed where there would be a sharing of power.

Coming to section 11(b), the primary provision, subsection (1) requires that holding companies be restricted to a single integrated public utility system except when subclauses (A), (B) and (C) are satisfied. For clarity we quote in full.

> (A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;
>
> (B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

> (C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

These exceptions to section 11(b)(1) were added as a result of a compromise with the House. The original Senate bill had flatly restricted holding companies to a single integrated system. S. 2796, 74th Cong., 1st Sess. (1935). The House sought to permit as many systems as were consistent with the public interest. See H.R. Rep. No. 1318, 74th Cong., 1st Sess. 17 (1935). The Commission's then chairman objected that this would be intolerably indefinite. 79 Cong. Rec. 10838 (July 9, 1935); see also H.R. Rep. No. 1318, *supra*, at 45. Clauses (A), (B) and (C) were proposed as a compromise to establish "definite and concrete circumstances" where retention of more than one system would be allowed. Statement of House Managers, *supra*, at 70.

It is basic to the Commission's position that the phrase "substantial economies which can be secured by the retention of control" in clause (A) is fundamentally different from "substantial economies [that] may be effectuated by being operated as a single coordinated system" in section (29)(B).[8] Such a con-

[8] The Commission is committed to this, and expressly so recognizes in its brief, because it rejected certain important evidence offered by NEES solely on the ground that the eight gas companies were conceded to be "a single integrated system." Since the Commission could not, either in good conscience or in law, accept as a concession a matter so fundamental, not only to the present proceedings, but for the future, if it were contrary to the fact, it stands that the Commission feels that saving $329,400 annually by integrating the eight gas companies

tention, of course, is opposed to the common principle that the same words in different portions of an act are presumed to have the same meaning. In this case they are exactly the same.[9] To overcome the presumption calls for an affirmative showing.[10]

Furthermore, we find the Commission's interpretation of clause (A) opposed to the initial statement of the purposes of the Act, *supra*, the tenor of which was that holding companies had been found uneconomical to investors and to the public. It is not inconsistent with this to say that systems which do not offend in this respect, or in the other respects defined in clauses (B) and (C), should be continued instead of broken up, and that occasioning a loss of impressive proven economies was not the Congressional purpose. This was a business reorganization act designed to produce a healthier economic structure in a vital industry. It established what, in the opinion of Congress, accomplished the best overall conditions. At the same time, Congress remained receptive to what, in a particular

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is effectuating substantial economies under section (29)(B), but that $1,098,600 annually is not substantial economies under clause (A).

[9] The Commission's brief goes to some length in emphasizing the word "loss" in section 11(b)(1)(A). Sections 2(a)(29)(B) and 11(b)(1)(A) are not incomparable because the former speaks in terms of effectuating and the latter in terms of losing. The important comparison is the word "effectuated" in the one section and "secured" in the other. Both relate directly to "substantial economies."

[10] In a special effort to make this showing counsel argues that there is a policy in the Act against an electric utility system being combined with a gas system. The short answer to this is that neither the Act, nor the Commission itself, says so. Since, however, counsel's argument is extensive we will reply in kind, but in order not to prolong this footnote we will do so in an appendix, *infra*.

instance and within the limits established by clauses (B) and (C), might be affirmatively shown to be a more economical arrangement. We hold that clause (A) called for a business judgment of what would be a significant loss, not for a finding of total loss of economy or efficiency. *Louisiana Pub. Serv. Comm'n* v. *S.E.C.*, 5 Cir., 1956, 235 F. 2d 167, *rev'd on jurisdictional grounds*, 353 U.S. 368.

We are confirmed in this view by the fact that not only do clauses (B) and (C) contain additional conditions of retention, so that clause (A) need not be interpreted so as to cover the entire Congressional intent, but that these other clauses relate back fully to counterparts of the declarations of purpose made in section 1(b), and the attempts to effectuate those purposes through the definitions made in section 2(a)(29), *supra*. Clause (A) would do the same were it not for the special restricted meaning that the Commission seeks to give it. The Commission, in other words, has attached to "substantial economies" in this one particular place a special meaning that nothing in the Act points to, and which, in fact, destroys its symmetry.[11]

It might not be inappropriate to conclude with the quotation with which the Commission began a section of its brief. "As was stated [the brief says] in the

[11] Drawing an equivalence between the proviso contained in clause (A) to section 11 and the corresponding requirements for an integrated gas system under section 2(a)(29)(B) nullifies no technical requirements in the definition of an integrated gas system because there are none. The definition of an integrated electric system under section 2(a)(29)(A) does contain some technical requirements, as has been pointed out, but these, also, are not nullified by our interpretation of clause (A) since it remains stricter than section 2(a)(29)(A)'s requirement that the electric system "may be economically operated."

report of the National Power Policy Committee: '[I]ntensification of economic power beyond the point of proved economies not only is susceptible of grave abuse but is a form of private socialism inimical to the functioning of democratic institutions and the welfare of a free people.' * * * H. Doc. No. 137, 74th Cong., 1st Sess. 4 (1935), appended to S. Rep. No. 621, 74th Cong. 1st Sess." We cannot think that "proved economies," any more than "substantial economies," mean anything other than economies which in ordinary business parlance and by ordinary business standards are of a substantial nature, considering, of course, the size of the companies to which the economies relate.[12] Clearly that was what was meant elsewhere in the Act. If in clause (A) Congress meant, instead, "cannot be operated efficiently as an independent system" it could readily have done so not only more clearly, but in fewer words.

The Commission's only answer is "the policy of the Act." We think the policy of the Act is to be found in the whole Act, not in one part. NEES has the burden of proving that it falls within an exception. This is enough, without a forced reading into that exception of some special meaning.

We regret the length of this discussion. Since, however, we find the Act not only consistent, but entirely responsive to analysis, we feel such analysis called for in fairness to those persons, whether investors or consumers,[13] who must absorb perhaps a

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[12] In this case the claimed losses are over 23% of gross income. See fn. 7, *supra*.

[13] The Commission's finding it significant that it was insufficiently shown that this loss would require an increase in rates "at this time," fn. 7, *supra*, not only disregards the fact that the cost of doing a utility business normally is passed on to consumers eventually, but the fact that one of the purposes of the Act was to benefit legitimate investors.

million dollars a year (quite apart from over $800,000 allegedly lost to the electric system) which the Commission feels insubstantial.

The Commission having applied the wrong standard, its decision must be reversed unless on the record there could have been no finding in NEES' favor on the appropriate standard. We think clearly there could have been. NEES' case was based essentially upon a study made for it by Ebasco Services, Inc., (Ebasco), a management consultant which the Commission found possessed extensive experience in the utilities field. No rebuttal evidence, other than some exhibits, was offered on behalf of the Commission, which grounded its rejection of the report, to the extent that it did reject it, solely on criticism of the report's conclusions in the light of NEES' evidence or its own expertise. Its specific criticisms related to that portion of the report which dealt with certain costs totalling $472,100 or, more specifically, for the most part, customer and accounting costs included therein, for which the Ebasco estimate was $415,600. The first criticism concerned billing. The circumstances were these. Ebasco's original study was made on the assumption that the gas companies would be individually managed. On this hypothesis it naturally assumed that each company would conduct separate customer billing. When the Commission took the position that the gas companies constituted a single integrated system and should be sold as such, Ebasco was required to reduce its estimate by the amount attributable to operating the gas companies individually rather than as a unit. It made no reduction with respect to customer billing.

On this subject NEES called three witnesses. One Quig, a representative of Ebasco with ample qualifications, testified to certain accounting savings that could

be effected if the gas companies were operated collectively rather than individually. He stated, however, that Ebasco would not recommend, at least at the outset, centralization of certain matters, including billing; that a continuing study might show that further centralization would prove useful, but that it was by no means clear that economy lay in that direction, and that it would depend on such factors as business growth, new developments in mechanization, etc. Subsequently one Dalbeck, the principal officer of NEES' gas division, testified that it was conceivable that centralized billing might be effected to some degree, but that in his opinion it was not really important cost-wise; that he had made many studies of customer accounting procedures and had never found any real economies in centralization of billing. Thereafter one Johnson, an Ebasco representative with particular experience in customer accounting, testified that a detailed study would have to be made, which Ebasco had not done; that based upon his experience he had considered centralized billing for the combined operation and had made the judgment that there would be no economy, or at least "any substantial savings." The witness was cross-examined at length and showed a wide knowledge not only of specialized mechanical equipment in this area and the problems involved, but also of the particular practices of a large number of named utilities in various parts of the country. He recognized that in many instances centralized billing prevailed, but continued to express doubts as to how much was saved thereby.

The Commission's response to this was to point out that some of the NEES gas companies presently combined their billing with the electric companies in their areas. This matter had been explained by NEES' witnesses, who pointed out, *inter alia*, the duplication

of customers, which would not exist in the case of gas companies operating alone. The Commission concluded, however, that NEES had not "given any satisfactory reason why at least some form or forms of combined billing procedure could not be employed advantageously by the gas companies, in light of the fact that their aggregate of 237,000 customers is located in a relatively compact area."

We have serious doubts as to the extent that the Commission is entitled to disregard an opinion on a matter obviously requiring expert, specialized knowledge with no further evidence before it than what had been considered by the accepted expert. *Cf. United Shoe Mach. Corp.* v. *Industrial Shoe Mach. Corp.,* 1 Cir., 1964, 335 F. 2d 577, 579, *cert. den.* 379 U.S. 990; *Security-First National Bank* v. *Lutz,* 9 Cir., 1963, 322 F. 2d 348, 355; *Alvary* v. *United States,* 2 Cir., 1962, 302 F. 2d 790, 794; *Cullers* v. *Commissioner,* 8 Cir., 1956, 237 F. 2d 611, 616. This is not a matter on which a body having such broad jurisdiction as the Commission can have detailed expertise upon which to base affirmative findings. Compare *Market St. Ry.* v. *Railroad Commission,* 1945, 324 U.S. 548, 560. Without finally passing upon this point, since the case must go back in any event, we suggest that on this record the maximum the Commission was warranted in inferring was that the difference in costs between separate and combined billing would not, if significant at all, constitute a sizable portion of the total added billing expense.

This brings us to what was the added billing expense, and hence the amount of error attributed to the Ebasco report because of its failure to assert the saving which, in the Commission's opinion, could be effected by having centralized billing. The Commis-

sion concluded merely that Ebasco's failure caused the estimate to be "overstated." It did not concern itself with discovering even what were the total increased billing costs, let alone the portion (obviously not the whole) which might be saved if centralized billing were adopted. It did find that the increased billing costs estimated for two of the eight gas companies, billing singly after divestiture, was $34,700 for the two. These companies covered more than half of NEES' gas customers. On a pro rata basis this would make the total billing increase for all companies $60,000. While doubtless such a projection is not precise, it seems significant that the Commission was not sufficiently interested to make any at all. Under the circumstances we do not think it unreasonable for us to point out that while the Commission was purportedly criticizing a cost estimate of over $400,000, strictly it was speaking of perhaps $60,000, only a portion of which could have been overstated.

We might have more sympathy with some, but not all, of the Commission's criticism of certain other alleged accounting disparities. Frankly, we are not sufficiently versed, nor do we find the record sufficiently helpful, to permit our analyzing them in every detail. However, it has not been contended that, even cumulatively, they remove from the Ebasco $472,000 cost estimate many sizable items.

After discussing the above matters the Commission said,

> In view of respondent's burden of proof and the absence of a persuasive explanation on the record, Ebasco's failure to consider employment of combined billing procedures and its inadequately explained disparate treatment of certain effects of severance on the gas and electric companies, respective, substantially impair the

> credibility and preclude the acceptance of its estimate of $472,100 increase in treasury and accounting costs and, in turn, of its over-all estimate of increased costs (of which that figure is a material part) in the determination of whether severance would result in a substantial loss of economies.

If this constitutes a finding that the deficiencies which the Commission believes it has found are so serious that the Commission was entitled to reject the balance of the report from that very fact, we cannot agree. The doctrine of *"falsus in uno, falsus in omnibus,"* so far as it has any value, ordinarily applies to cases of deliberate falsehood. See 3 Wigmore, Evidence § 1013 (3d ed. 1940). The Commission has not suggested, and we see no possible basis for suggesting, that the discrepancies it complains of indicate bias or dishonesty. Absent a finding that the errors found are related to, or infect, other matters not directly discredited, if the *"falsus in uno"* doctrine, or a corollary, is to be used on any further basis to impeach an expert's report, it must be shown that the errors are so serious that they indicate substantial carelessness, or otherwise impugn the expert's qualifications. See *e.g., Hoag* v. *Wright,* 1903, 174 N.Y. 36, 43; 66 N.E. 579, 581. Again, the Commission made no such findings. If there was a ground for them it has not been suggested. Indeed, the Commission demonstrated its confidence in Ebasco elsewhere by accepting its cost estimates as the basis for concluding that the gas companies constitute an integrated system.

On the record there is a large, residual showing in the Ebasco report. Even at minimum it is $1,098,000 minus some fraction of $472,000. However, we do not think it presently appropriate for us to consider whether such minimum showing meets our interpreta-

tion of "substantial economies." We do state, however, that on remand the Commission must address itself to this problem by making specific findings, and not content itself with general conclusions. One illustration of this will suffice. The Commission states in its brief that it "had the right to consider competitive advantages of separation in offsetting alleged losses of economies." We do not question this. What we do question is the Commission's failure to find or articulate any specific or approximate financial benefit that such a change would occasion. Free competition, as the Act recognizes is normally beneficial. It is not necessarily so, nor in any assumed amount. The various automotive divisions of General Motors seem to do very well. More close to home, the Massachusetts Department of Public Utilities, which voices no apparent criticism of a number of combined local gas and electric companies within the Commonwealth, affirmatively appeared in opposition to the Commission's proceeding in the present case. The Commission states that the Department's views have been "carefully considered," but it goes no further. If the Commission is of opinion that substantial gains will accrue to the gas system by placing it in competition with the electric companies rather than, in part, under the same roof, specific findings should be made, and not just a general reference to the advantages of competition. This is particularly called for where the evidence shows that NEES has made a special effort to obtain for its gas system many of the benefits of independence.

Decree will be entered vacating the order of the Commission and remanding for further action not inconsistent herewith.

In the Commission's brief counsel argues that section 11(b) embodies a federal concern with use of the holding company form to combine a gas system with an electric system. There are several answers to this. In the first place, it is too specialized an approach. The meaning of this section and of sub-clauses (A), (B) and (C) must be the same whether the principal system and the additional systems are of like nature or are different. "Substantial economies," in other words, should have the same connotation in the one case as in the other.

Secondly, nowhere in the Act is there a condemnation of the retention of gas and electric systems, provided the tests contained in clauses (A), (B) and (C) are met. To the contrary, section 8 prohibits a holding company's acquisition of gas and electric utilities serving the same territory, where state law prohibits combined gas and electric operations, without express approval of the state commission. If anything, this is a negative pregnant, as the Commission has recognized and the legislative history makes clear. See *Northern States Power Co.*, 1954, 36 S.E.C. 1, 8; S. Rep. No. 621, 74th Cong., 1st Sess., 29-30; H.R. Rep. No. 1318, *supra*, at 14–15; Report of National Power Policy Committee, H.R. Doc. No. 137, 74th Cong., 1st Sess. 10 (1935), appended to S. Rep. No. 621, *supra*, at 59; Hearings Before House Committee on Interstate and Foreign Commerce on H.R. 5423. 74th Cong., 1st Sess. 330 (1935) (statement of Rep. Ray-

burn). How far such an inference may be carried in the light of the fact that section 10(c), which prescribes the standards for acquisitions, expressly incorporates the retention standards, and requires further that an acquisition tend toward the development of an integrated system, may be questioned. *Cf. American Water Works & Elec. Co.*, 1937, 2 S.E.C. 972, 983 & n. 3; *Columbia Gas & Elec. Corp.*, 1941, 8 S.E.C. 443, 462–63; *American Gas & Elec. Co.*, 1946, 22 S.E.C. 808, 815. But at the least we find neither there nor elsewhere in the Act a general policy of opposition to gas and electric company joinder.

Nor, if the matter could be thought to be illuminated by administrative practice, has the Commission previously made such an interpretation, nor does it now. In its opinion the Commission stated, "We do not take the view that the Act expresses a federal policy against combined gas and electric operations as such." Counsel's attempt to explain this away by saying the Commission's phrase "as such" meant simply that the Commission was disclaiming interest when the interstate holding company form was not employed, attributes to the Commission the banality that it was not claiming jurisdiction in those cases where obviously it does not have it. We believe the Commission was saying sometning more than this, and that counsel, in the brief is merely seeking some new ground to support the Commission's result.

Decree

June 4, 1965

This cause came on to be heard upon petition to review and set aside an order of the Securities and Exchange Commission, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the Commission is vacated, and the case is remanded for further action not inconsistent with the opinion filed today.

By the Court:

(S) Roger A. Stinchfield,
Clerk.

Approved,

(S) Aldrich, *Ch. J.*

APPENDIX B

On the following pages is a table of cases in which the Commission directed registered holding companies to divest themselves of securities or properties upon the specific finding that they constituted systems which were not retainable under Section 11(b)(1)(A) of the Act. In certain of these cases, the Commission also found that the electric or gas companies (or properties) involved were not retainable under other standards of Section 11(b)(1) as well. The chart does not include dispositions of securities or properties by registered holding companies that occurred in probable anticipation that the Commission would find that they could not meet the retention standards of Clause (A).

Top holding company	Citations	Majority interests divested [1]	
		Number of companies	Aggregate assets
The North American Co., et al.	11 S.E.C. 194 (1942)	6	$554,473,003
	18 S.E.C. 611 (1945)	1	13,129,400
Engineers Public Service Co., et al.	12 S.E.C. 41 (1942)	1	19,019,927
Cities Service Power & Light Co.	14 S.E.C. 28 (1943)	13	59,995,535
Middle West Corp., et al.	15 S.E.C. 309 (1944)	4	97,751,921
Cities Service Co., et al.	15 S.E.C. 962 (1944)	13	More than 148,258,253
Peoples Light and Power Co., et al.	20 S.E.C. 357 (1945)		
American Gas and Electric Co., et al.	21 S.E.C. 373 (1945)	3	97,684,103
Commonwealth & Southern Corp., (Del.), et al.	26 S.E.C. 464 (1947)	6	722,259,916
Pennsylvania Gas & Electric Corp., et al.	28 S.E.C. 553 (1948)	2	2,093,558
Philadelphia Co., et al.	28 S.E.C. 35 (1948)	3	113,605,913
Eastern Utilities Associates, et al.	31 S.E.C. 329 (1950) 40 S.E.C. 162 (1960) HCAR 18020 (1964)	1	12,234,309
General Public Utilities Corp.	32 S.E.C. 807 (1951)		
Middle South Utilities, Inc., et al.	35 S.E.C. 1 (1953) 40 S.E.C. 193 (1960)	1	19,061,622
Totals		54	1,859,567,460

[1] In more than three-quarters of these instances, the holding company owned at least 90 percent of the outstanding voting securities of the divested subsidiary, and in only one instance did holding company ownership amount to less than 65 percent of such securities.

[2] These are cases in which the divestment of specific physical properties, as distinguished from utility companies, was ordered. In some instances, after divestiture was ordered, the properties

Physical properties divested [2]		Minority interests divested [2]	
Number of seller companies	Properties divested	Number of companies	Investments divested
		2	$104, 685, 086
1	4, 551, 309		
1	Not available		
1	182, 000		
		1	255, 851
1	13, 757, 386		
4	18, 490, 695	3	104, 940, 937

were transferred by the owner company to a newly organized subsidiary, whose stock was subsequently disposed of.

[2] These figures represent the consideration received by the holding companies upon disposition of their minority interests.

U.S. GOVERNMENT PRINTING OFFICE: 1969

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 636

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

NEW ENGLAND ELECTRIC SYSTEM ET AL.,
Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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TABLE OF CITATIONS

*See Appendix A to this Brief.

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BRIEF FOR RESPONDENTS IN OPPOSITION[1]

QUESTION PRESENTED FOR REVIEW

The Respondents are dissatisfied with the Petition's statement of the question presented. It seems to imply (i) that the interpretation in this case by the Securities and Exchange Commission of the phrase "substantial economies" is one of long standing and (ii) that the Commission's use of that interpretation has been so extensive and consistent as to entitle it to special consideration by the courts, neither of which is true. The Respondents say that the question presented for review is:

> Do the common words "substantial economies" as used in Clause (A) of Section 11(b)(1) of the Public Utility Holding Company Act of 1935 have their normal meaning, that is, economies which in ordinary business judg-

[1] The time for filing this Brief was extended by the Clerk from November 1 through December 1, 1965.

ment would be regarded as important or significant considering the business to which they relate, the meaning which the Commission, in this case, tacitly assumed for them in connection with Section 2(a)(29) (B) of the Act; or for the purposes of Clause (A) alone are the words to be so construed that economies, however important, are not to be deemed substantial unless their loss would render the additional system incapable of sound and economical operation, a meaning which cannot be found in the words themselves and is not suggested by anything else in the Act?

STATUTE INVOLVED

The Petition's statement of the statute involved (Pet. 2) omits significant sections which were cited and considered by the court below and, to a more limited extent, by the Commission. The following sections of the Holding Company Act are relevant and are set forth in Appendix A to this Brief: Sections 1(b)(4)-(5) and (c), the applicable statement of purposes and policy of the Act; Sections 2(a)(29)(A) and (B), the applicable definitions of an "integrated public-utility system"; and Section 11(b)(1)(A)-(C), the statement of the circumstances and conditions under which additional systems may be retained.

STATEMENT OF THE CASE

The Respondents are dissatisfied with the Petition's "Statement" (Pet. 3) in the following particulars:

1. The description of the lower court's holding and reasoning (Pet. 6) is incomplete and inaccurate. The holding on the question here presented was not based on the narrow grounds stated in the Petition, but rather on a painstaking and detailed analysis of the statute with due consideration of its purpose, its legislative history, its structure and wording, the consideration given it by other courts and by the Commission, and all other relevant factors. Respondents respectfully refer the Court to the

opinion itself (Pet. App. A, particularly pp. 3a-15a and 22a-23a).

2. The account of the proceedings below is seriously inaccurate and misleading in saying that "all parties agreed to consider [the gas companies] as an 'integrated gas utility system' " (Pet. 4), thus implying that findings and a conclusion on this issue and a statement of the reasons for the determination, as required by the Administrative Procedure Act,[2] were unnecessary. The Petition's inaccurate account of the proceedings below, and the Commission's attempt to dispose of this issue by "conceding" it (R. 1256) instead of dealing with it in the normal way, are of particular significance as they obscure critical inconsistencies in the Commission's procedures and holdings in this case.

Whether or not the gas companies constitute a single integrated system was one of the principal issues in the case and was recognized as such at the hearing. It was specified in the Order of Notice in the same terms as the corresponding issue relating to the electric properties (R. 20; also see R. 39-41). Extensive evidence relating to it was introduced. Months after completion of Respondents' affirmative case, the Commission's staff for the first time disclosed its intention at an appropriate time to urge the Commission (R. 772), and in its brief after the hearings were concluded it did urge the Commission, to make the determination. At no time did either the staff or the Respondents even suggest disposing of the issue otherwise than through appropriate findings by the Commission in the regular way.

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[2] "All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof." Section 8(b). 60 Stat. 242 (1946), 5 U.S.C. § 1007(b) (1964).

With respect to the issue of integration of the electric properties (on which the staff, following hearings, did not oppose Respondents' position), the Commission issued its comprehensive Findings and Opinion and Order (R. 27). With respect to the same issue relating to the gas companies, in striking contrast, the Commission issued no findings or opinion but stated that the issue was conceded (R. 1256).

As pointed out in the opinion below, the Commission, in "conceding" this issue, must necessarily have considered economies of $329,400 annually to be "substantial economies" under Section 2(a)(29)(B) of the Act (Pet. 12a n. 8). In ordering divestment the Commission affirmatively found economies of $1,098,600 annually not to be "substantial economies" under Section 11(b)(1)(A). Had the Commission made the necessary findings on the issue under Section 2(a)(29)(B), it would have had to face this fatal inconsistency.

3. The statements that in the instant case the Commission applied the same interpretation of "loss of substantial economies" that it had applied in every other divestiture case under Section 11(b)(1) (Pet. 5), and that under this test over $2,000,000,000 of utility assets have been divested (Pet. 12) are clearly erroneous. The cases in question are listed in Appendix B to the Petition. A careful analysis of them (see pp. 5-7 below and Appendix B to this Brief) discloses that only three of the thirteen cases cited, involving less than 7½% of the total assets divested, even purported to apply the interpretation presented here, and in not one of them does it appear that the interpretation was determinative of the issue. It also appears that the vast majority of the total assets divested were properties which, unlike those in the instant case, were geographically separated from the principal systems involved, and had to be divested under the standards of Clause (B) or (C) of Section 11(b)(1), irrespective of their status under Clause (A).

4. The Petition contains no reference to the fact that the Department of Public Utilities of Massachusetts, the state in which all the Respondent gas companies are located, intervened as a party in the proceedings before the Commission and strongly opposed divestment of the gas companies. The Department's Chairman testified at length to the effect that divestment would not be in the public interest or achieve any benefits, but would result in the impairment of service and the loss of substantial economies, which loss would fall ultimately on consumers. (R. 41-42, 582, 588-94).

ARGUMENT

The Petition suggests that the decision below is erroneous and states three reasons for review: (i) the importance of reinstating the Commission's alleged long-standing interpretation of Clause (A) (Pet. 2, 5, 12); (ii) an alleged direct conflict between the decision below and two District of Columbia decisions (also, apparently, that it is "inconsistent with" a Second Circuit case and, possibly, "at variance with" a Fifth Circuit case) (Pet. 7); and (iii) the alleged impact of this case on "substantial utility interests in all parts of the country" (Pet. 7, 12). None of these reasons is valid.

(i) *The Commission's interpretation is not long-standing and few, if any, assets have been divested under it.*

The Commission's present interpretation of Clause (A) is not, as claimed, a long-standing administrative interpretation[3] under which more than $2,000,000,000, or any other substantial amount, of assets have been divested.

---

[3] The Petition appears to state several different interpretations, but none of them is long-standing. They are (i) that the economies lost must be "such as to render the additional system incapable of sound and economical operation" (Pet. 2); (ii) that the additional system cannot be operated separately "without the loss of economies so important as to cause a serious impairment" (Pet. 5); and (iii) that the additional system must be "incapable of independent economical operation" (Pet. 12).

Of the cases cited, those involving divestitures of approximately $1,062,800,000 of assets,[4] or more than half, directly contradict the Petition's argument. The interpretation applied was the one set forth by the Commission in *North American*, which was approved on review by the Second Circuit, and followed by the Commission in later cases: namely, a loss of economies which would be important or significant in light of the circumstances. It was basically the same as the interpretation which was adopted by the court below in the instant case, but is now being opposed by the Petitioner. It was stated by the Commission in *North American* in these words:

> "The normal and usual meaning of the word 'substantial' is a meaning connoting 'important'. And we think that this normal and usual meaning is compelled here. The degree of importance must be measured against the vital policy to which Clause (A) is an exception, *i.e.*, the policy of limiting holding companies to the operation of a single integrated public utility system."[5]

In *Engineers*,[6] involving another divestiture of approximately $23,600,000 of assets, the Commission stated an intermediate test—loss which "would seriously impair the effective operations of the systems involved" (not merely be important and yet not necessarily render effective operations impossible); but the actual decision rested on inadequacy of proof.

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[4] See Item 1 in Appendix B to this Brief.

[5] North American Co., 11 S.E.C. 194, 209 (1942); North American Co. v. SEC, 133 F.2d 148, 152 (2nd Cir. 1943), *aff'd on constitutional issues*, 327 U.S. 686 (1946). In contrast to its present unqualified reliance on Senator Wheeler's post-enactment remark (referring to a system so small that it is "incapable of independent economical operation"), the Commission in *North American* viewed his statement as doing no more than shedding "some light on the background", reinforcing the Commission's conclusion that Clause (A) was intended as a "significant standard" and refuting North American's argument that "substantial economies" meant only something more than "purely nominal". 11 S.E.C. at 209.

[6] See Item 2 in Appendix B to this Brief.

Additional divestitures[7] of approximately $750,100,000 of assets are irrelevant for the reason that the evidence in the cases was insufficient under any standard, and the Commission disposed of all of them without stating any interpretation of Clause (A).

The three remaining cases[8] involve divestiture of approximately $146,400,000 of assets, or less than 7½% of the $2,000,000,000 claimed by the Petition. In these three cases only has the Commission stated as its interpretation of Clause (A) a standard similar to its present interpretation, and in none of them does it appear that such interpretation was the determining factor. In *Philadelphia* (chronologically the ninth case on the Commission's list of thirteen and the first to set forth as the Commission's interpretation the test now asserted to have been the basis of the decision in all of them), the opinion on the Section 11(b)(1) question was devoted principally to an analysis of the evidence submitted by the respondent, which the Commission rejected in its entirety. In the second case, *General Public Utilities,* the respondent did not contest divestiture, and in the third case, *Middle South Utilities,* the respondent had submitted no study of any kind to show the economies to be lost by the additional system upon severance.

In brief, Respondents contend that the test now stated by the Commission has not been determinative in any of the administrative decisions cited in the Petition.

(ii) *The Circuits accord.*

As pointed out by the court below (Pet. 6a), there has been some diversity of view expressed by circuit court judges; but there has been no direct conflict in the actual decisions.

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[7] See Item 3 in Appendix B to this Brief.

[8] See Item 4 in Appendix B to this Brief.

The first judicial interpretation of Clause (A) was in the Second Circuit. The court there approved the Commission's interpretation in *North American* noted above: that "substantial" economies means "important" economies and not merely something more than nominal.[9] The court naturally made no reference to the Commission's present interpretation, as it had not then been formulated.

In the second case (*Engineers*),[10] the District of Columbia Court of Appeals adopted the Second Circuit's interpretation in *North American*. However, the principal issue was not the meaning of "substantial" but whether the net effect of divestment could be established by evidence of operational savings through combined operations, without more. On this question the court divided, with the majority approving the Commission's requirement of "a clear and convincing showing that the operational savings through combination would be sufficient to support a finding that such single item of saving would constitute an overall substantial economy." Deciding the case on the inadequacy of the evidence, the majority did not reach the Commission's interpretation of "substantial" as used in Clause (A).[11]

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[9] North American Co. v. SEC, 133 F.2d 148, 152 (2d Cir. 1943), *aff'd on constitutional issues*, 327 U.S. 686 (1946).

[10] Engineers Pub. Serv. Co. v. SEC, 138 F.2d 936, 944 (D.C. Cir. 1943), *cert. granted*, 322 U.S. 723 (1944), *dismissed as moot*, 332 U.S. 788 (1947).

[11] The dissent by Judge Soper suggested that substantial savings in operational expenses can be substantial economies, and so in his dissent (unlike the majority opinion) the standard applied by the Commission had to be considered. Judge Soper's view was that the Commission was "putting it too strongly" to say "that there must be clear and convincing evidence of loss of economies which would seriously impair the efficiency of the systems." 138 F.2d at 945.

In *Philadelphia,* its second case involving Clause (A), the District of Columbia Court of Appeals held that the Commission had not acted unreasonably in rejecting the utility's estimate of increased operating expenses as insufficiently established.[12] The court added, moreover, that as stated in *Engineers,* the mere showing of a material saving in operational expense did not necessarily show the overall situation. The court then went on and agreed that the Commission could find support for its interpretation of "substantial economies" in parts of the legislative history. However, the court did not hold that the Commission's interpretation of "substantial" was correct; for purposes of the decision that was not necessary. The court concluded its discussion as follows:

> " 'Substantial' is a relative and elastic term. Petitioners concede that economies, to be substantial, must be 'important'. We cannot say the Commission's understanding of the term 'substantial economies' is wrong. We construed it similarly in the Engineers case."[13]

In *Louisiana,* the most recent case before this one, the Fifth Circuit expressly rejected the Commission's interpretation of Clause (A) advocated here, and also noted that neither *Engineers* nor *Philadelphia* had accepted that interpretation.[14]

In sum, the Commission's present interpretation has been placed squarely in issue twice—in this case, and in *Louisiana.* Each time it has been rejected. The earlier cases, *North American* and *Engineers,* do not conflict, as they involved a far less severe test. *Philadelphia's* support for the Commission's interpretation is weak: it is

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[12] Philadelphia Co. v. SEC, 177 F.2d 720, 724 (D.C. Cir. 1949).

[13] 177 F.2d at 725.

[14] Louisiana Pub. Serv. Comm'n v. SEC, 235 F.2d 167, 173 (5th Cir. 1956), *rev'd on jurisdictional grounds,* 353 U.S. 368 (1957).

dictum, and the court itself thought it was going no further than it had in *Engineers*. The law under Clause (A) is thus sufficiently settled, and this Court's review is unnecessary.

(iii) *The question presented is not of sufficient general importance to require review.*

The Holding Company Act was adopted in August, 1935. By Section 11(b) the Commission was directed "as soon as practicable after January 1, 1938" to require registered holding companies to comply with the integration and structural requirements imposed by that Section.

Now, thirty years after enactment, the basic purpose of the Act—the rationalization of the gas and electric utility industry—has been fulfilled. Last year the Chairman of the Commission so stated.[15] He also termed the Act a "vestigial duty" of the Commission, but noted that retention of the Act as a duty of the Commission would have the limited effect of inhibiting the rebirth of abuses. This preventive duty is the function of other sections of the Act, not of Section 11, and is not in issue here.

The mere fact that during this entire period, in which on any theory the great bulk, if not all, of the necessary Section 11(b)(1) reorganizations have been accomplished, this Court has not once had to pass on the issue now presented goes a long way in refuting the claim that it is of significant general interest or importance or may be expected to "affect substantial utility interests in all parts of the country" in the future (Pet. 7).

The Petition cites only four "possible future Section 11(b)(1) proceedings" (Pet. 12-13). Three of these are no more than secondary issues left over from Section 11 pro-

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[15] Cary, *Administrative Agencies and the Securities and Exchange Commission*, 29 Law & Contemp. Prob. 653, 655 (1964).

ceedings otherwise completed in the 1940's and early 1950's.[16] The fourth involves a local gas utility service in Wilmington, Delaware and environs.[17] These problems, if such they are, have existed at least since 1938. They are not nation-wide but local. Their continuing existence over the years and the absence of any Commission order with respect to them indicate that they certainly have not been and are not now matters of serious concern.[18]

The Petition also expresses concern over possible problems in one proposed regional combination of utilities, and two proposed joint generating facilities, one of which is apparently only "under discussion" (Pet. 13-15). Two of these matters will not involve the ABC tests of Section 11, but rather the provisions of Section 10, which provide the Commission ample power to prevent the creation of new Section 11(b)(1) problems. In the Commission's own view, the ABC tests of Section 11 are not reached in a Section 10 proceeding, and hence resolution of the problems of possible future combinations does not depend on determination

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[16] See Utah Power & Light Co., 14 S.E.C. 764, 784-85 (1943); Columbia Gas & El. Corp., 17 S.E.C. 494, 522-24 (1944); Middle South Util., Inc., 35 S.E.C. 1, 15 (1953).

[17] Delaware Power & Light Company. See Moody's Public Utility Manual 442 (1965).

[18] See Dean, *Twenty-five Years of Federal Securities Regulation by the Securities and Exchange Commission*, 59 Colum. L. Rev. 697, 741-42 (1959). Further, the Commission itself has recognized that there is no policy in the Act against combined gas and electric operations, a conclusion with which the Court below concurred (Pet. 13a n. 10, 22a-23a.). And see Representative Eicher's statement that a regionally integrated public-utility system like New England Power Association (the former name of New England Electric System) and essentially intrastate holding companies like Pacific Gas and Electric, both of which had electric and gas businesses, are exempted from the elimination provisions of Section 11 of the strict Senate bill. H.R. Rep. No. 1318, 74th Cong., 1st Sess. 49 (1935).

of the question presented in this case.[19] The third matter (the Snake River project) has been before the Federal Power Commission for over ten years.[20] It might, at some time in the future,[21] involve Section 11(b) of the Holding Company Act, but more probably would arise under Section 10. At present it is not possible to predict when, if ever, or in what posture or under what section the case may come up for decision.

(iv) *The decision below is correct.*

The opinion below of the First Circuit is strong and well reasoned. It speaks for itself and few (if any) words are needed here to answer the criticisms voiced in the Petition (Pet. 15-16).

The Petition contends that the lower court erred in not imposing a completely artificial construction on the words "substantial economies", and attempts to support that contention by stating that the court rejected relevant legislative history. This argument is without merit. The opinion below takes fully into account the legislative history (Pet. 6a-9a, 12a, 15a), including the analysis made in the House Managers' Report, Senator Wheeler's prejudiced remarks made after the passage of the Act, and the statements made by Representatives O'Connor and Cooper.

The suggestion that the decision below undermines the major aim of limiting each holding company to a single integrated system ignores the fact that the Act affirmatively requires the Commission to permit the retention of additional systems if they meet the ABC tests. The Court properly examined the language to determine its intent instead of distorting the language to fit an assumed intent.

---

[19] See American Gas & Electric Co., 22 S.E.C. 808, 815 (1946).

[20] See Pacific Northwest Power Co., 14 F.P.C. 644 (1955).

[21] See Pacific Northwest Power Co., SEC Holding Co. Act Release No. 15026 (March 3, 1964).

The assertion that accepting the common meaning of the statutory words "substantial economies" does not comport with Congress' intent to provide a definite test of qualification for retention ignores the obvious fact that the test for which the Petition argues is itself indefinite, subjective and difficult of application (See Pet. 6a n. 5, 9a n. 7). The phrase "incapable of sound and economical operation" appears to be no more definite and specific or conducive to voluntary divestiture than the phrase "loss of substantial economies". Each phrase requires some exercise of judgment.

Apparently the Petition's principal complaint is that the lower court declined to follow the Commission's administrative construction of Clause (A). The record of the Commission's construction of the clause, as shown above (pp. 5-7), is not such as to impress a court or to bring into operation what the Petition refers to as "the accepted canons of construction", giving weight to "longstanding administrative construction" (Pet. 15).

Finally, the Petition suggests that the lower court incorrectly relied on what it perceived to be the symmetry of the Act, referring particularly to the fact that the statute combines language drafted in the House, the Senate and in conference. Irrespective of origins, the Act discloses a remarkably clear unity of purpose and coherence of implementation. This kind of symmetry is both relevant and important. The definitions in Section 2(a)(29) governing combinations in a single system first appeared in the House version of the Act, and the Senate and House conferees had these definitions before them when they agreed to insert in Section 11 the present provisions governing combinations of several systems. It would indeed require compelling reasons, not present here, to warrant giving the identical words "substantial economies" different meanings in these two places. In fact, this principle has in the past been recognized by the Commission with

respect to Sections 2(a)(29) and 11(b)(1).[22] It was stated to this Court by the Commission in its reply brief defending its interpretation of Clause (A) in *Engineers:*

> "Indeed the relationship of dependence required for retention is particularly clear in the case of gas properties because the definition of a single integrated system in Section 2(a)(29)(B) applicable to gas properties substantially overlaps the standards of the (A) and (C) clauses of Section 11(b)(1), as they apply to additional systems. Thus it is clear that Congress intended the relationship between a single system and an additional system should be comparable to that between parts of the same system. . . ."[23]

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 23, 1965

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[22] North American Co., 11 S.E.C. 194, 214 (1942); Cities Serv. Power & Light Co., 14 S.E.C. 28, 59 (1943); Commonwealth & Southern Corp., 26 S.E.C. 464, 488-89 (1947). See also Lone Star Gas Corp., 12 S.E.C. 286, 295 (1942), and United Gas Improvement Co., 9 S.E.C. 52, 72 (1941).

[23] Reply Brief for Commission pp. 19-20, Engineers Pub. Serv. Co. v. SEC, *cert. granted,* 322 U.S. 723 (1944), *dismissed as moot,* 332 U.S. 788 (1947).

APPENDICES

APPENDIX A

Statute Involved

Sections 1(b)(4)-(5), and (c), 2(a)(29), and 11(b)(1) of the Public Utility Holding Company Act of 1935[1]

Section 1. (b) . . . [I]t is hereby declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected—

. . .

(4) when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties; or

(5) when in any other respect there is lack of economy of management and operation of public-utility companies or lack of efficiency and adequacy of service rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital.

(c) When abuses of the character above enumerated become persistent and widespread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating

[1] 49 Stat. 803-04, 810, 820 (1935), 15 U.S.C. §§ 79a(b) and (c), 79b(a)(29), 79k(b)(1) (1964).

such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title.

SECTION 2. (a) When used in this title, unless the context otherwise requires—

. . .

(29) "Integrated public-utility system" means—

(A) As applied to electric utility companies, a system consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility assets, whether owned by one or more electric utility companies, are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation; and

(B) As applied to gas utility companies, a system consisting of one or more gas utility companies which are so located and related that substantial economies may be effectuated by being operated as a single coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation: *Provided*, That gas utility companies deriving natural gas from a common source of supply may be deemed to be included in a single area or region.

SECTION 11. . . .

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

APPENDIX B

Classification of Administrative Cases Listed In Appendix B To The Petition.[1]

	Assets Divested
1. Cases stating or following test set forth by the Commission in *North American* (11 S.E.C. 194 (1942)); basically the same test adopted by the court below in this case:	
North American Co., 11 S.E.C. 194, 209 (1942)	$ 659,158,089
Cities Serv. Power & Light Co., 14 S.E.C. 28, 37, 47-48 (1943)[2]	59,995,535
Middle West Corp., 15 S.E.C. 309, 319 (1944)	97,751,921
Cities Serv. Co., 15 S.E.C. 962, 984 (1944)	148,258,253
American Gas & El. Co., 21 S.E.C. 575, 596-97 (1945)	97,684,103
Sub total	$1,062,847,901
2. Proof inadequate but an intermediate test stated, namely, the loss "would seriously impair the effective operations of the systems involved" (12 S.E.C. at 61):	
Engineers Pub. Serv. Co., 12 S.E.C. 41, 57-65, 79-81, 86-88 (1942)	$ 23,571,236
3. Evidence insufficient under any standard and no interpretation of Clause (A) stated by Commission:	
North American Co. (St. Louis Properties), 18 S.E.C. 611, 613-15, 621 (1945)	$ 13,129,400
Peoples Light & Power Co., 20 S.E.C. 357, 380-81 (1945)	182,000
Commonwealth & Southern Corp., 26 S.E.C. 464, 487-90 (1947)[3]	722,259,916

	Assets Divested
Penn. Gas & Elec. Corp., 28 S.E.C. 553, 558 (1948)	$ 2,34[illegible],409
Eastern Util. Ass'tes, 31 S.E.C. 329, 348-52 (1950)	12,234,309
Sub total	$ 750,155,034
4. Test similar to Commission's present interpretation stated, but not determinative:	
Philadelphia Co., 28 S.E.C. 35, 46-47, 53-74 (1948)	$ 113,605,913
General Pub. Util. Corp., 32 S.E.C. 807, 814-15, 826-27, 831 (1951)	13,757,386
Middle South Util., Inc., 35 S.E.C. 1, 11-13 (1953)	19,061,622
Sub total	$ 146,424,921
Grand Total	$1,982,999,092

[1] Figures are taken from said Appendix B as they cannot in most instances be verified from the cited cases.

[2] Includes one subsidiary (net assets of approximately $422,000 or only approximately 1% of the assets ordered divested in the case) as to which the Commission said that, although it was small, the record did not show the company was "incapable of economic, independent operation". This was viewed as "*one* of the guides which (*among others*) Congress intended to be used...." 14 S.E.C. at 62. (Emphasis added.) Significantly, this language was not cited in support of the interpretation stated in *Philadelphia*. (See Item 4 above.)

[3] Includes one subsidiary (net assets of approximately $28,000,000 or only approximately 4% of the assets ordered divested in the case) which the utility had agreed to divest and which the Commission held not retainable under Clause (C) but as to which the Commission also quoted the language stated in note 2 above. 26 S.E.C. at 487, 489.

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CITATIONS

Cases—Continued

Cases—Continued

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 636

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

NEW ENGLAND ELECTRIC SYSTEM, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 1455–1471) is reported at 346 F. 2d 399. The findings and opinion of the Securities and Exchange Commission, dated March 19, 1964 (R. 1254–1282), are reported in the Commission's Holding Company Act Release No. 15096.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1965 (R. 1471–1472). On September 2, 1965, Mr. Justice Black extended the time to file a petition for a writ of certiorari to October 2, 1965. The petition was filed on October 1, 1965, and was

granted on December 13, 1965 (R. 1472). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 11(b)(1) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79k(b)(1), permits a registered holding company to control one or more integrated public-utility system in addition to its principal integrated system only if the Commission finds, *inter alia,* that "Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system * * *." The question presented is whether the court below erred in rejecting the Commission's longstanding interpretation that, under this provision, "the loss of substantial economies" must be such as to render the additional system incapable of sound and economical operation independent of the principal system and in holding instead that the required loss is merely one which, in ordinary business parlance, is of a substantial nature.

STATUTE INVOLVED

Section 11(b)(1) of the Public Utility Holding Company Act of 1935, 49 Stat. 820, 15 U.S.C. 79k(b)(1), provides in pertinent part:

> It shall be the duty of the Commission, as soon as practicable after January 1, 1938:
>
> (1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commis-

sion shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, * * * *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system * * *.

Pertinent parts of Section 1 and Section 2(a)(29) of the Act are set forth in an Appendix, *infra,* pp. 41–44.

STATEMENT

On August 5, 1957, the Securities and Exchange Commission instituted proceedings under Section 11(b)(1) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79k(b)(1), to determine the extent to which New England Electric System ("NEES"), a holding company registered under Section 5 of the Act, 15 U.S.C. 79e, could lawfully retain control over the electric, gas and other properties in its holding company system. The initial phase of the proceedings terminated on February 20, 1958, when the Commission held that the electric utility subsidiaries of NEES comprised an "integrated electric utility system" as defined in Section 2(a)(29)(A), 15 U.S.C. 79b(2)(29)(A).[1] NEES elected to retain

[1] *New England Electric System*, 38 S.E.C. 193.

its electric system as its "single" or "principal" system, and the Commission proceeded to hold further hearings, commencing May 18, 1960, on the question whether NEES's gas utility subsidiaries—which both NEES and the Commission's staff agreed to consider as constituting an "integrated gas utility system" within the meaning of Section 2(a)(29)(B), 15 U.S.C. 79b(a)(29)(B) (R. 23–24, 46–47, 49, 772; see *infra*, p. 22)—could be retained by NEES as an "additional integrated public-utility system" under Section 11 (b)(1).[2]

At the commencement of the gas integration proceedings, NEES controlled, *inter alia*, fourteen electric utility companies, eight gas utility companies and a service company. The retail electric companies served 824,000 customers in a franchise area of 4,600 square miles within the States of New Hampshire, Massachusetts, Rhode Island and Connecticut (R. 1256–1257).[3] The gross investment in electric plant and equipment, as of December 31, 1958, was approximately $600,000,000, and gross revenues from sales of electricity in 1958 were approximately $143,000,000 (R. 1256–1257).

NEES's gas subsidiaries provided retail service to 237,000 customers in a franchise area of 660 square

[2] NEES has not contested the Commission's longstanding interpretation that an "integrated public-utility system" cannot include both gas and electric utility properties. See *Columbia Gas & Electric Corp.*, 8 S.E.C. 443, 461–463; *The United Gas Improvement Co.*, 9 S.E.C. 52, 77–83; *Philadelphia Co.*, 28 S.E.C. 35, 44.

[3] The figures used herein are for the year ended December 31, 1958, which was the latest year for which audited financial statements were available at the time of the hearings (R. 1257).

miles entirely within Massachusetts. Seventy-five percent of this area was also a part of the franchise area of NEES's electric subsidiaries, and about 78 percent of the gas customers were also served by NEES's electric subsidiaries. As of December 31, 1958, NEES's investment in gross gas plant and equipment was approximately $56,300,000, and gross revenues in 1958 from the sale of gas were $22,700,000 (R. 1257–1258). Except for manufactured gas used only during peak periods and for emergency standby purposes, NEES sells natural gas obtained by pipeline from the southern United States. Of the twelve Massachusetts nonaffiliated gas companies which respondents selected during the proceedings for comparison with NEES, only one exceeded the NEES gas utility system in size of gross plant, gross annual revenues or number of customers (R. 1272, n. 24, 1365).

NEES acquired most of its gas subsidiaries between 1926 and 1931. In 1952, "as a step in effectuating compliance by NEES with the integration provisions of Section 11(b)(1) of the Act," NEES proposed to sell its Massachusetts gas properties as a unit[4] and obtained three bids therefor (R. 70, 58, 1258, 1264, n. 13). Although a contract was entered into with the highest bidder, it was not consummated because the purchaser failed to obtain the anticipated financing (R. 48, 70, 1258). In the same year, NEES established a Gas Division to supervise its eight gas companies, all of which are within 48 miles of the

[4] *New England Electric System*, Holding Company Act Release No. 11016 (1952).

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Division headquarters except one company, which is 80 miles away (R. 1257–1258). The head of the Gas Division is also the president of each gas company and is ultimately responsible to NEES's vice-president in charge of management (R. 1305). Notwithstanding the creation of this Division, certain aspects of the electric and gas businesses continue to be handled on a joint basis (R. 1258).

After a full hearing, the Commission determined that the divestment of NEES's gas utility companies would not result in a "loss of substantial economies" to those companies within the meaning of Section 11(b)(1)(A) (R. 1255–1280) and ordered that they be divested (R. 1280–1281). The Commission found that NEES's estimate of the loss of economies flowing from divestiture was exaggerated,[5] and that,

[5] After the Commission reduced NEES's original estimate by $67,000 to take account of certain revised payments (R. 1264–1265)—the correctness of which deduction NEES does not dispute (see R. 1456, n. 1)—NEES urged that the amount of lost economies would be $1,098,000 a year. This figure was based upon a Gas Severance Study prepared by Ebasco Services, Inc. The Commission found that the estimated increase in annual operating costs of the combined gas companies after severance was inadequately supported in that there were unexplained inconsistencies, particularly with respect to the figure for customer accounting, which represented approximately 40 percent of the estimated total increased expenses and which may have been substantially overstated (R. 1265–1266). The Commission also found that a "supplemented Ebasco study, which assumed that the gas system would be operated on a combined basis, estimated the same increase in customer accounting costs as appeared in the original Ebasco study, which was based on the assumption that the companies would be operated separately," and it found that NEES and Ebasco failed adequately to explain "why combined operations would not re-

even if it were to accept NEES's figure, NEES had failed to show a "loss of substantial economies" within the meaning of Clause (A). In so holding, the Commission interpreted the relevant provision, as it has done in prior divestment cases dating back more than twenty years, to require a showing that each "additional system cannot be operated under separate ownership without the loss of economies so important as to cause a serious impairment of that system" (R. 1262–1263). Under this test, the Commission ruled that, on the basis of the record before it, it was unable "to find that the gas companies could not be soundly and economically operated independently of NEES * * *" (R. 1279).

On NEES's petition for review (R. 1286–1294), the court of appeals reversed the Commission's order—not on the ground that the Commission's conclusions were unwarranted under the test which it had applied—but on the theory that the Commission had misinterpreted the statutory phrase "loss of substantial economies" (R. 1458–1466). The court held "that clause (A) called for a business judgment of what would be a significant loss * * *" (R. 1464) and, concluding that on the record there could have been a finding in NEES's favor under this standard (R. 1466), remanded the case to the Commission.

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sult in lesser amounts for such costs" (R. 1265–1266). The Commission, in spot-testing the Ebasco study, examined Ebasco's estimates of treasury and accounting expenses in two communities where NEES's subsidiaries operated both gas and electric companies and found great disparities between the estimated increases in expenses attributed to the electric companies and those attributed to the gas companies (R. 1267–1268).

SUMMARY OF ARGUMENT

A. The primary aim of Section 11(b)(1) was to restrict a holding company's control over operating utility companies to one integrated public utility system. This theme constantly recurs in the congressional material—from the report of the National Power Policy Committee, which prepared the first draft of the holding company bill, to the Statement of the Managers on the Part of the House, appended to the report of the conference committee which ultimately produced the present version of the Act. The bill that the Senate first passed flatly prohibited central control of more than a single integrated system. This was modified by the House to provide for flexibility by giving the Commission almost complete discretion to determine which additional integrated systems, if any, a holding company could retain. In conference, the House's desire for flexibility was satisfied by specifying certain narrow conditions "under which," in the words of the House Managers, "exception should be made to the form of one integrated system." H. Rep. No. 1903, 74th Cong., 1st Sess., 71. The exception in Clause (A) would be called into play, the House Managers reported, only where "a real economic need on the part of the additional integrated systems" was shown. *Ibid.* This need cannot be demonstrated merely by showing what in ordinary business parlance would be a significant loss. Rather, as the Commission held, Congress required a showing of such a relationship between the principal and the additional systems that

the latter could not operate soundly and economically independent of the former.

The Commission's reading of Clause (A) is fully consonant with the Act as a whole. The court of appeals' interpretation, on the other hand, unduly emphasizes the reference to "economy of management" in Section 1(b) of the Act, at the cost of distorting the basic congressional purpose. The court also erred—in both its factual premise and its reasoning—in basing its rejection of the Commission's interpretation on the ground that the Commission erroneously gave different meanings to the words "substantial economies" when used in two different parts of the Act. The Commission did not in fact adjudicate the issue whether there were "substantial economies" as used in Section 2(a)(29)(B) (which defines "integrated gas system") but merely accepted its staff's concession that NEES's gas companies formed an integrated system as defined in that section, in order to expedite resolution of the critical question under Section 11. The court's treatment of this salutary issue-narrowing procedure—followed by most administrative agencies and encouraged by Congress—was wholly unjustified. In any event, there is no inconsistency in a reading of the Act which gives full effect to the congressional policy in favor of grouping geographically-related properties into a single system for operational purposes (reflected in Section 2(a)(29)(B)) as well as to the policy against holding-company retention of more than one integrated system other than in exceptional circumstances (reflected in Section 11(b)(1)(A)).

B. The court below erred in failing to accord any weight to the Commission's interpretation of Section 11(b)(1)(A). When Congress entrusts the application of a general standard, such as "the loss of substantial economies," to an administrative agency, this Court has made it clear that the agency's view as to the meaning of the statutory standard, unless manifestly unreasonable, is entitled to great deference. Respondents cannot justify the court of appeals' failure to give due regard to the administrative construction on the ground that in the present case the Commission applied a test different from that which it has consistently used in the past. Respondents concede that the Commission applied the same test in this case that it stated in the *Philadelphia Co.* case in 1948, and analysis of the Commission's other decisions shows that the test the Commission articulated here is basically the same as that it has consistently applied in the past. Nor can it seriously be contended that the Commission's interpretation in the present case is manifestly unreasonable. The legislative history and statutory framework as well as the fact that the Court of Appeals for the District of Columbia Circuit has twice construed the provision in the same manner as the Commission, give weighty support to the Commission's construction.

C. One practical difference of major importance between the Commission's interpretation and that of the First Circuit should be pointed out. A major evil of control over both gas and electric utility systems by a single holding company is the favoring by the controlling company of one otherwise competitive

form of energy over the other. It is clear that Congress intended that the Commission should deal with this problem under Section 11(b)(1), and the Commission in fact took the anticompetitive consequences of retention into account in the present case. The court's interpretation of Clause (A), however—requiring a finding of the beneficial effect of divestiture upon competition solely in terms of dollars or percentages—does not properly leave room for meaningful consideration of this crucial competitive factor, since competitive consequences are not capable of precise measurement in these terms. Abandonment of the Commission's test for that of the court below, therefore, would, as a practical matter, greatly impair the congressional goal of eliminating "restraint of free and independent competition" set forth in Section 1(b)(2) of the Act.

ARGUMENT

THE COMMISSION CORRECTLY RULED THAT SECTION 11(b)(1)(A) OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 PROHIBITS A HOLDING COMPANY FROM RETAINING MORE THAN ONE INTEGRATED PUBLIC UTILITY SYSTEM UNLESS THE COMPANY SHOWS THAT THE ADDITIONAL SYSTEM SOUGHT TO BE RETAINED IS INCAPABLE OF SOUND AND ECONOMICAL OPERATION INDEPENDENT OF THE PRINCIPAL SYSTEM

Congress made it abundantly clear in enacting Section 11—which this Court has recognized as the "very heart of the title"[6]—that the Commission was mak-

[6] See *North American Co.* v. *Securities and Exchange Commission*, 327 U.S. 686, 704, n. 14, where this language was quoted from S. Rep. No. 621, 74th Cong., 1st Sess., 11.

dated to take such action as it found necessary "to limit the operations [of holding companies] to a single integrated public utility system * * *" (Section 11(b)(1)). To this basic provision, an explicit and, as we shall show, a narrow exception was carved out. Thus, a holding company may continue to control one or more additional integrated public-utility system only if the Commission finds:

> (A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;
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> (B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and
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> (C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.[7]

Since Congress did not specify what it meant in Clause (A) by "substantial economies," the meaning of that phrase must be derived from the general design and policy of the legislation and its legislative history.

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[7] As the Commission noted (R. 1260–1261), the only issue here involved Clause (A), since the requirements under Clauses (B) and (C) were met.

A. THE HISTORY AND DESIGN OF SECTION 11(b)(1)(A) SUPPORT THE COMMISSION'S INTERPRETATION

1. The underlying premise of Section 11 was that an undue extension of the field of operations of a holding company system is not conducive to efficiency, or, in any event, does not result in efficiencies commensurate with the social and economic disadvantages involved. As the National Power Policy Committee reported:[8]

> Because * * * [the growth of holding company systems] has been actuated primarily by a desire for size and the power inherent in size, the controlling groups have in many instances done no more than pay lip service to to the principle of building up a system as an integrated and economic whole, which might bring actual benefits to its component parts from related operations and unified management. * * *

Accordingly, Congress determined that the scope of holding company operations had to be strictly limited.

As originally introduced by Representative Rayburn in the House and Senator Wheeler in the Senate, Section 11 of the holding company bill called for the

[8] Report of the National Power Policy Committee, H. Doc. No. 137, 74th Cong., 1st Sess., 4, appended to S. Rep. No. 621, 74th Cong., 1st Sess. The National Power Policy Committee was an interdepartmental committee appointed by the President and composed of persons in the government most concerned with the power problem. The first draft of what is now the Holding Company Act was prepared by the Committee in collaboration with leaders in the House and Senate. See Hearings Before the Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess., 156.

elimination of all holding company systems which were not "geographically and economically integrated." See S. 1725, Sec. 11(b), 74th Cong., 1st Sess. See also S. Rep. No. 621, 74th Cong., 1st Sess., 32; 79 Cong. Rec. 14781 (March 28, 1935) (remarks of Senator Wheeler). The bill first passed by the Senate contained no provision for the retention by a holding company of more than one integrated public utility system; indeed, it required the complete elimination of holding companies, save in the exceptional circumstance where the Federal Power Commission would certify that continuance of the holding company was necessary for the proper functioning of the integrated system.[9] The House modified the bill, however, and adopted a substitute which directed the Commission to order holding companies and their subsidiaries to limit their "operations * * * to a single integrated public utility system, except that if the Commission finds that it is not necessary in the public interest to so limit the operations of such holding-company system, the order of the Commission shall require such company to take only such action * * * as the Commission finds necessary to limit such operations to such number of integrated public utility systems as it finds may be included in such holding-company system consistently with the public interest." H. Rep. No. 1318, 74th Cong., 1st Sess., 17. The intent of the House was to allow some flexibility in

[9] S. 2796, 74th Cong., 1st Sess.; S. Rep. No. 621, 74th Cong., 1st Sess., 32; Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 5423, 74th Cong., 1st Sess., 333–334.

the administration of Section 11, leaving substantial discretion in the Commission to develop the law on a case-by-case basis.

The House version was strongly criticized on the ground that it was too indefinite to be an effective guide to administration and so broad as to defeat the basic purpose of Section 11.[10] Senator Wheeler, Senate Manager of the bill, agreed with these criticisms, and suggested that the House bill involved an unconstitutional delegation of legislative power to the Commission (79 Cong. Rec. 10842 (July 9, 1935)).

The present provisions in the ABC clauses were inserted in conference. The narrow scope of the exception which these standards permit was explained in the Statement of the Managers on the Part of the House appended to the conference report on the substituted bill finally enacted (H. Rep. No. 1903, 74th Cong., 1st Sess., 70–71):

> * * * Section 11 of both [House and Senate] bills * * * authorizes the * * * Commission to require a *holding company to limit its control over operating utility companies to one integrated public-utility system.*
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> * * * *
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> The conference substitute meets the House desire to provide for further flexibility by the statement of additional definite and concrete circumstances under which exception should be made to the form of one integrated system. * * *

[10] Letter of Joseph P. Kennedy, then Chairman of the Commission, 79 Cong. Rec. 10838 (July 9, 1935); Additional views of Congressman Eicher, H. Rep. No. 1318 on S. 2796, 74th Cong., 1st Sess., 45.

> The substitute, therefore, makes provision to meet the situation *where a holding company can show a real economic need on the part of additional integrated systems for permitting the holding company to keep these additional systems under localized management with a principal integrated system.* [Emphasis added.]

Further light was shed on the purpose of the section, as envisaged by the conference committee, by the remarks of Senator Wheeler, a member of that committee, delivered a few minutes after the Senate adopted the conference substitute, but before the bill was enrolled [11] (79 Cong. Rec. 14479 (Aug. 24, 1935)):

> Since *both bills accepted the proposition that a holding company should normally be limited to one integrated system,* my colleagues and I conceived it to be our task to find what concrete exceptions, if any, could be made to this rule that would satisfy the demand of the House for some greater flexibility. After considerable discussion the Senate conferees concluded that *the furthest concession* they could make would be to permit the Commission to allow a holding company to control more than one integrated system if [among other tests] the additional systems were in the same region as the principal system *and were so small that they were incapable of independent economical operation* * * *. [Emphasis added.]

From this review of the legislative history, several points emerge, which, we submit, substantiate the Commission's interpretation of the Act. It is clear that, generally, a holding company was to be limited to a single integrated public utility system. This Court

[11] See 79 Cong. Rec. 14520 (Aug. 24, 1935).

expressly recognized this cardinal principle in *North American Co.* v. *Securities and Exchange Commission*, 327 U.S. 686, 696–697.[12] Whether an additional system was retainable because it came within the narrow exceptions was made to depend on that system's relationship to the principal system. Retention was permissible if it resulted in "the integration and coordination of related operating properties" (see Section 1(b)(4), 15 U.S.C. 79a(b)(4)) under a management single-mindedly devoted to the development of those related properties in "free and independent competition" (see Section 1(b)(2), 15 U.S.C. 79a(b)(2); see also, *infra*, pp. 34–38). But an additional integrated system which was able to stand alone—*i.e.*, capable of managing its own affairs—was to be given its independence.[13] See *Philadelphia Co.*, 28 S.E.C. 35, 46,

[12] "In essence, [Section 11(b)(1)] confines the operations of each holding company system to a single integrated public utility system with provision for the retention of additional systems only if they are relatively small, located close to the single system and unable to operate economically under separate management without the loss of substantial economies * * *."

[13] The mere fact that the eight NEES gas companies in 1958 had gross assets in gas plant of $56,300,000 and gross revenues that year from the sales of gas of $22,700,000 (R. 1257–1258) demonstrates that we are dealing with an enterprise of a size amply capable of independent operation. Indeed, their gas system is larger than all but one of the Massachusetts companies respondents chose for comparison. Accordingly, the Commission properly found that, even if independent operation of so large a gas system were to increase costs by the claimed $1,098,000, such loss of economies was not "substantial" in the light of the congressional intent. As the Commission found, "In the instant case, the amount of the estimated loss of economies would be equal to 4.83% of the gas system's operating revenues, 6.03% of operating revenue deductions (excluding federal income taxes) and 23.28% of gross income and 29.94 percent

affirmed *sub nom. Philadelphia Co.* v. *Securities and Exchange Commission*, 177 F. 2d 720 (C.A. D.C.). In short, "the loss of substantial economies" contemplated by Congress was such a loss as would render the additional system incapable of sound and economical operation independent of the principal system.

This legislative intent—clearly reflected in the Commission's interpretation—was wholly ignored, and consequently undermined, by the court below. Thus, for example, although it noted that the House Managers' Statement (*supra*, pp. 15–16) contained a "pertinent characterization" of the phase "substantial economies" (R. 1460), the court declined to accord the Statement any weight. This was plainly unwarranted. While the meaning of "real economic need" as used in the Statement may be subject to dispute, it is quite evident that the Statement contemplated a test much stricter than the court of appeals' standard of "a business judgment of what would be a significant loss" (R. 1464).[14] Moreover, nothing in

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of net income before federal income taxes" (R. 1270). These ratios—of which the percent of operating revenue deductions is perhaps the most significant—are comparable to those in other gas severance cases in which the Commission had required divestment (R. 1270, 1282).

[14] Also erroneous, in our view, was the court's rejection of Senator Wheeler's statement on the results of the Senate-House conference (*supra*, p. 16). On the ground that the statement was made after the Senate's vote on the conference committee's bill, the court held that it was "not to be given the weight to which it might have been entitled if made at another time" (R. 1460). But the report of a legislator so instrumental in the passage of the statute and so familiar with its provisions and purposes as was Senator Wheeler is entitled to greater respect. This Court has recognized the significance of an "ex-

the history reviewed above suggests that Congress intended the test of retainability to be "a business judgment of what would be a significant loss." Indeed, even the most lenient version of the statute—that first passed by the House—contemplated a more stringent test. See, *supra*, pp. 14–15.

2. The Commission's interpretation of Section 11 (b)(1)(A)—strongly supported, as we have shown, by the legislative history—is fully consonant with the design of the Act as a whole, and the court of appeals' suggestion to the contrary is without merit. In concluding that Section 11(b)(1)(A) "called for a business judgment of what would be a significant loss" (R. 1464), the court below relied on language in the Act's statement of purposes, "the tenor of which," it found, "was that holding companies had been found uneconomical to investors and to the public" (R. 1464). From this premise, the court reasoned, in effect that "economical" holding-company systems—which also meet the requirements of Clauses (B) and (C)—need not be restricted to a single integrated utility system. In so reasoning, the court unduly emphasized one of several congressional policies embodied in the Act, thereby distorting its meaning.

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plicit statement by the one most responsible" for enactment of a statute (*Leedom* v. *International Union*, 352 U.S. 145, 150), and the Court of Appeals for the District of Columbia Circuit expressly relied on Senator Wheeler's remarks as a relevant aid to the interpretation of Section 11. See *Philadelphia Co.* v. *Securities and Exchange Commission*, 177 F. 2d 720, 725; *Engineers Public Service Co.* v. *Securities and Exchange Commission*, 138 F. 2d 936, 941–942, certiorari granted, 322 U.S. 723, vacated with directions to dismiss the petition for review as moot, 332 U.S. 788.

It is true, of course, that lack of "economy in management and operation" was among the evils of holding-company operations which the Act was designed to eliminate. See Section 1(b)(4), (5). Indeed, several provisions of the Act are plainly designed, in large measure, to assure efficient and economical management. See Sections 7(d)(3); 10(c)(2); 12(d), (f) and (g); and 13. But there is no basis for exalting the goal of eliminating uneconomical management above such other enumerated objectives as "the integration and coordination of related operating properties" (Section 1(b)(4)) and elimination of "restraint of free and independent competition" (Section 1(b)(2); see *infra*, pp. 34–38). Much less is there any warrant to construe the reference to economy of management as precluding the application of Section 11(b)(1) whenever the retention of additional systems would produce operational economies. Such a reading would in large degree nullify the plain mandate of Section 11(b)(1), since—as Congress clearly contemplated [15]—in most instances some economies of management (which, presumably, businessmen would view as significant) are likely to result from retention. The Commission's interpretation includes consideration of the Act's policy of eliminating holding company control where such control is unrelated to

[15] See Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 5423, 74th Cong., 1st Sess., pt. 2, pp. 1249, 1402–1403, 1530–1531, pt. 3, pp. 2257–2277; Hearings Before the Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess., 65. See also *Engineers Public Service Co.* 12 S.E.C. 41, 61, quoted *infra* at p. 30.

"economy of management,"[16] but—unlike the First Circuit's construction—it also takes into account other important congressional objectives.

The court of appeals rejected the Commission's interpretation of Clause (A) on the further ground that the Commission had erred in reading the phrase "substantial economies" therein differently from its reading of the same words in Section 2(a)(29)(B). The latter section defines an integrated gas utility system as "one or more gas utility companies which are so located and related that substantial economies may be effectuated by being operated as a single coordinated system." The court reasoned that since the Commission had treated the gas properties as an integrated gas system, and since NEES alleged that operating such properties together as a single system would result in annual savings of $329,400, the Commission necessarily must have concluded that "saving $329,400 annually by integrating the eight gas companies is effectuating substantial economies under section (29)(B), but that $1,098,600 annually is not substantial economies under clause (A)" (R. 1463, n. 8).[17]

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[16] See the cases in which the Commission has permitted holding-company retention of "additional" systems under Section 11(b)(1)(A), *infra*, n. 21, p. 31.

[17] The figures were taken from the Ebasco Gas Severance Study introduced by NEES (*supra*, n. 5). No analysis of these figures is called for in the present posture of the case. We point out, however, that in stating the court's premise on the basis of those figures we concede neither that the Ebasco study is accurate nor—more pertinent here—that the estimated saving to the gas companies from operation as an integrated

The court's analysis is faulty because it rests upon (a) an erroneous factual premise and (b) erroneous reasoning.

a. Once NEES had designated its electric system as its principal system, the question was which, if any, of its gas properties it could retain as an additional system. NEES contended that all of its gas companies constituted a single integrated system and the Commission's Division of Corporate Regulation, in order to simplify the issues and to expedite determination of the crucial question under Section 11(b)(1), conceded (R. 772) that the gas companies were an integrated system. The Commission, without making any findings thereon, decided the case on that assumption (R. 1256). This concession, however, made primarily for the purpose of simplifying the decision on the Section 11 issue, cannot fairly be treated as an informed determination by the Commission that the alleged annual savings of $329,400 resulting from operating the NEES gas companies as a single system constituted "substantial economies" as that term is used in Section 2(a)(29)(B).

It is common practice, before both courts and agencies, for the litigants to stipulate as to a particular issue, in order to eliminate it as a contested point in the case, and for the tribunal to accept such stipulation as a basis for deciding the case. But in thus accepting the stipulation the tribunal

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system is, under any interpretation of "substantial economies," comparable to the "loss of economies" which would result from divestment of the gas system under Section 11(b)(1).

cannot be said in any meaningful sense to have determined or adjudicated the issue thus stipulated. To treat the Commission's acceptance of the staff's concession that the NEES gas properties are an integrated system as a formal Commission determination that savings of $329,400 constitute "substantial economies" under Section 2(a)(29)(B), and then to tax the Commission with inconsistency because it held that additional expenses of approximately one million dollars did not represent the loss of substantial economies under Section 11(b)(1)(A), would be wholly unjustified. It would be at odds with recent salutary developments in administrative procedure designed to narrow, as far as possible, the issue in dispute.[18] For the effect of the court of appeals' ruling, if generally followed, would be to discourage agencies and their staffs from conceding any points in a case for purposes of simplifying the decision, and to cause them to insist that all issues be fully litigated.

b. Assuming, however, that the Commission has read the words "substantial economies" differently in the two sections, that does not vitiate the Commission's interpretation of clause (A). "It is not unusual for the same word to be used with different

[18] See, for example, Section 5(a) of the Administrative Procedure Act, relating to responsive pleadings and to "prompt notice of issues controverted in fact or law" and Section 7(b)(6) of the Act, relating to conferences "for the settlement or simplification of the issues by consent of the parties." See also, *e.g.*, S. 1336, § 5, 89th Cong., 1st Sess. (March 4, 1965), a pending bill to amend the Administrative Procedure Act and to provide for pre-hearing procedures to resolve facts and issues not in dispute.

meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance." *Atlantic Cleaners & Dyers* v. *United States,* 286 U.S. 427, 433. In the Holding Company Act the test of "substantial economies" serves different functions under Section 2(a)(29)(B) and 11(b)(1)(A), and the words therefore may properly be given different meanings under the two sections.

The determination whether a particular group of utility properties constitutes an integrated system under Section 2(a)(29) serves two purposes in the administration of Section 11(b)(1)(A). First, since the latter section basically limits a holding company to "a single integrated public-utility system," that system must be defined in order to ascertain what properties the holding company may retain without regard to the proviso concerning the retention of additional systems. Second, it is necessary to determine whether the additional properties which the holding company seeks to retain under the proviso themselves constitute an integrated system, since only those properties which make up "additional integrated public-utility systems" are capable of retention under Section 11(b)(1).

In deciding for these purposes whether a group of gas properties constitutes an integrated system, the statutory inquiry under Section 2(a)(29)(B) is whether the properties "are so located and related" that their operation as a "single coordinated system" is likely to produce substantial economies. The an-

swer will depend largely upon the geographic and operational characteristics of and relationships between the properties. As long as the properties are in the same general geographic area and it appears that significant savings will be made by operating them as a "single coordinated system," there is no reason, in terms of the underlying statutory policies involved, why anything more need be shown to justify treating the properties as an integrated system. In other words, the definition of "integrated gas system" in Section 2(a)(29)(B)—like the parallel definition of "integrated electric system" in Section 2(a)(29)(A)—reflects a congressional policy in favor of grouping geographically-related utility properties into a single system for operational purposes.

When it comes to applying the standards of Section 11(b)(1), however, an entirely different policy comes into play. As we have noted, the basic congressional plan in that section was to limit holding companies to a single integrated system, and to permit them to retain additional systems only in those exceptional cases where such retention would meet the exacting requirements of the ABC clauses of the proviso. The fact that Congress approved the grouping of related properties into a single operating system is in no way inconsistent with its determination that a holding company ordinarily should not be permitted to retain more than a single such system.

Thus, when Section 11(b)(1)(A) permits the retention of only those additional systems that cannot be operated independently without the loss of substantial economies, this limitation reflects a congressional pol-

icy not in favor of grouping utility properties but against retention of additional systems other than in exceptional circumstances. In the light of the legislative history (*supra*, pp. 13–16) and the affirmative competitive benefits that result from elimination of joint holding company ownership and control of electric and gas properties (*infra*, pp. 34–38), we submit that "substantial economies" properly may be read as importing a far more stringent standard under Section 11(b)(1)(A) than under Section 2(a)(29)(B).[19]

B. THE COMMISSION'S LONGSTANDING INTERPRETATION IS ENTITLED TO GREAT DEFERENCE

It is a well established canon of statutory construction that "[t]he construction given to a statute by those charged with the duty of executing it is always

[19] Once the court had equated the meaning of substantial economies in Section 11(b)(1) to that in Section 2(a)(29)(B), it was compelled, in order to avoid nullifying the "technical requirements" of Section 2(a)(29)(A), to conclude that the term "substantial economies" in Section 2(a)(29)(B) was stricter than the requirement in Section 2(a)(29)(A) that the electric system "may be economically operated" (R. 1465, n. 11). But there is no reason to believe that Congress intended to provide any different substantive standards of operating savings in the definitions of integrated gas and integrated electric systems. On the contrary, the purpose which these definitions serve—to treat as an integrated system those properties which are so located that they are capable of economical operation in combination—requires the same standard of economies for both gas and electric. In other words, the verbal logic of the court compelled it to suggest different substantive standards where logically Congress would have intended the standards to be the same, in order to support its conclusion that the same standards must be applied in a situation where the congressional intent would appear to call for different standards.

entitled to the most respectful consideration, and ought not to be overruled without cogent reasons." *United States* v. *Moore*, 95 U.S. 760, 763; *Hastings & Dakota R.R. Co. v. Whitney*, 132 U.S. 357, 366. To sustain the Commission's interpretation of such a statute, the Court "need not find that its construction is the only reasonable one, or even that it is the result [it] would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153, quoted in *Udall* v. *Tallman*, 380 U.S. 1, 16.[20] This principle, which the court below disregarded, is fully applicable here.

Conceding that, since the *Philadelphia Co.* decision in 1948 (28 S.E.C. 35), the Commission has articulated no different test from the one it applied here, respondents argue that the Commission initially used a test basically the same as that adopted by the court below and then, in *Engineers Public Service Co.*, 12 S.E.C. 41, shifted briefly to a different, intermediate, test. See Brief for Respondents in Opposition, pp. 6–7, App. B. We disagree. As we now show, the criteria articulated by the Commission in the present case are essentially the same as those it has applied ever since it first dealt with the issue involved here.

In *The North American Co.*, 11 S.E.C. 194, 208–213, the Commission's first decision involving Section 11

[20] See also, *e.g.*, *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408; *Billings* v. *Truesdell*, 321 U.S. 542, 552–553; *Gray* v. *Powell*, 314 U.S. 402; *Universal Battery Co.* v. *United States*, 281 U.S. 580, 583; *First Nat'l Bank in St. Louis* v. *Missouri*, 263 U.S. 640, 658; *Surgett* v. *Lapice*, 8 How. 48, 71.

(b)(1)(A), the agency plainly did not interpret the statute the way the court below did. That case did not directly present the issue whether "substantial economies" meant economies whose loss would cause a serious impairment to the additional system. Recognizing the large size and potential independent strength of its "additional" systems, North American contended primarily that substantial economies meant only something more than nominal or *de minimis* economies. The Commission rejected this argument. Quoting with approval the remarks of Senator Wheeler on the conference committee version of Section 11(b)(1)(A) (*supra,* p. 16), the Commission stated: "These remarks reinforce the conclusion that Clause (A) was intended as a significant standard to be applied only where there was a strong reason for an exception to the general policy of permitting retention of only one integrated system" (11 S.E.C. at 209). In response to the company's argument that the subsidiaries relied upon the holding company for financing, the Commission significantly stressed the importance of independent management, single-mindedly devoted to the operation of integrated properties and to the interests of the stockholders therein. 11 S.E.C. at 211. In the same opinion, the Commission held that certain "smaller" integrated electric utility systems were retainable as additional systems under Section 11(b)(1)(A). 11 S.E.C. at 243–244.

In *Engineers,* the next Commission decision dealing with meaning of the provision in issue here, the Commission reemphasized the same themes which ran

through the legislative history of the Act and which were reflected in its *North American* decision. Flatly rejecting the interpretation espoused by respondents here, the Commission ruled as follows (12 S.E.C. at 57–58):

> In prescribing the conditions under which additional systems may be retained, however, Congress did not speak in terms of increased *expenses*. It authorized the retention of additional systems if they could not be operated independently without the loss of substantial *economies*. And in measuring the loss of *economies* accompanying the severance of a combination of two utility systems it is particularly important to consider the beneficial effects of independent ownership upon the efficient operation of each system. A consideration of increased expenditures alone does not adequately reflect the impact of severance upon the two systems. Where, as here, gas and electric operations are conducted in the same territory and in many ways compete with each other, the danger exists that under a single management one business may be suppressed in favor of the other or that one will bear burdens properly allocable to the other. The record before us shows, for instance, that there have been abuses in allocating expenses between gas and electric properties. * * * But that these abuses can most effectively be eliminated by complete severance is unquestionable. Moreover, the possible benefits of unsuppressed development and growth for each business must also be cast in the balance when substantial economies are measured. The economies which

> may be expected from a personnel single-mindedly devoted to the operation of either a gas or electric business, although not predictable in precise mathematical terms, cannot be ignored. [Italics in original.]

And the Commission further stated (12 S.E.C. at 60–61):

> The statutory scheme contemplates that a holding company will be confined to the operation of a single integrated public utility system and in exceptional cases to certain additional integrated utility systems. And Congress required that the circumstances under which so exceptional a combination can be permitted must depend, among other things, upon a showing that substantial economies would be lost in the break-up of such a combination. Since this requirement is an exception to a clearly expressed general policy, it must be strictly construed. Moreover, in determining what are substantial economies, we must bear in mind that Congress was informed that some loss of economies of the sort principally involved in this situation—in joint administrative, clerical and supervisory services and the use of joint facilities—almost inevitably would accompany separation of jointly controlled utility systems. Against this background we must require clear and convincing evidence of a loss of economies which would seriously impair the effective operations of the systems involved in order to permit the retention of an additional system.

While there was, of course, some variation in choice of words, due for the most part to the varying contentions with which the Commission was dealing, the

views of the Commission in *North American* and *Engineers,* as in *Philadelphia Co.,* clearly coincide with those expressed in the present case. See R. 1261–1262.[21] As the Commission summarized its decisions in this area in 1951 (*General Public Utilities Corp.,* 32 S.E.C. 807, 827):

> In connection with the phrase "loss of substantial economies" we have repeatedly held that a showing of such a loss has not been made by merely proving that elimination of the common control of the two systems would result in some increase in expenses. For the economies to be "substantial" they must be "important" in the sense that they are of such nature that their loss would cause a serious economic impairment of the system.[22]

The principle of judicial deference to the administrative construction was applied by the Court of Ap-

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[21] See also *Cities Service Power & Light Co.*, 14 S.E.C. 28, 37, 47–48; *Commonwealth & Southern Corp.*, 26 S.E.C. 464, 487–490; *Middle South Utilities, Inc.*, 35 S.E.C. 1, 11–13. Cf. *Middle West Corp.*, 15 S.E.C. 309, 319–320, 345; *Cities Service Co.*, 15 S.E.C. 962, 981–989; *Peoples Light & Power Co.*, 20 S.E.C. 357, 380–381; *American Gas & Electric Co.*, 21 S.E.C. 575, 596–598; *Pennsylvania Gas & Electric Corp.*, 28 S.E.C. 553, 557–558; *Eastern Utilities Associates*, 31 S.E.C. 329, 347–352.

For cases in which the Commission has permitted retention of small additional systems, see, *e.g.*, *Engineers Public Service Co.*, 12 S.E.C. 41, 90 (1942); *The North American Co.*, 11 S.E.C. 194, 243–244; *Republic Service Corp.*, 23 S.E.C. 436, 451; *Federal Light & Traction Co.*, 15 S.E.C. 675, 683; cf. *The North American Co.*, 32 S.E.C. 169, 178–180.

[22] In both of the cases decided by the Commission since 1951, *Middle South Utilities, Inc.*, 35 S.E.C. 1, and the present case, the Commission adhered to this interpretation. See 35 S.E.C. at 11–13 and R. 1261–1262.

peals for the District of Columbia Circuit in sustaining the Commission's interpretation of Section 11(b)(1)(A) in *Philadelphia Co.* v. *Securities and Exchange Commission,* 177 F. 2d 720. As that court stated (177 F. 2d at 725):

> In the Commission's view, economies are not "substantial" unless their loss "would cause a serious economic impairment of the system" such as to "render it incapable of independent economical operation." * * * "Substantial" is a relative and elastic term. Petitioners concede that economies, to be substantial, must be "important". *We cannot say the Commission's understanding of the term "substantial economies" is wrong.* We construed it similarly in the Engineers case. [Emphasis added.]

In the *Engineers* case (*Engineers Public Service Co.* v. *Securities and Exchange Commission,* 138 F. 2d 936 (C.A.D.C.), certiorari granted, 322 U.S. 723, vacated with directions to dismiss the petition for review as moot, 332 U.S. 788), the same court had upheld the Commission's reading of Section 11(b)(1)(A), expressly rejecting the construction espoused by respondents and the court below. There the court ruled as follows (138 F. 2d at 944):

> "Substantial economies", means something different and, we think, something more than substantial savings in operational expenses. Congress could have said that the divorcement shall not be decreed if the controlling utility or the controlled utility show at a hearing that the cost to operate the latter separately from the former would be substantially greater. If the Act can be construed as meaning just that,

> then the severance ordered here is wrong. "Substantial economies" must mean, as was said in North American Co. v. Securities and Exchange Commission, 2 Cir., 133 F. 2d 148, 152, "important economies." The required *importance* must relate to the healthful continuing business and service of the freed utility. But Congress was not so much concerned with the profit motive of utilities as with the evils that had become prevalent through combinations of utilities. It was first concerned with the wiping out of the evils which the practice of utility combinations had produced, and Congress only consented to dull the blade of its chosen weapon in proved hard cases.

The court also emphasized that, even though there might be a showing of "saving" in a combined operation, it could not be assumed that this "saving would constitute an overall substantial economy," when taking into consideration "so important an event as the freedom of a corporation from the ownership and control of another corporation engaged in a business to some extent intercompetitive * * *" (138 F. 2d at 944). See *infra*, pp. 34–38.

These decisions of the Court of Appeals for the District of Columbia Circuit, coinciding as they do with both the legislative history and the administrative interpretation of the Act, strongly support the Commission's reading of the Act.[23]

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[23] The only case other than the decision of the court below to reach a construction of Clause (A) contrary to that of the Commission is *Louisiana Public Service Commission* v. *Securities and Exchange Commission*, 235 F. 2d 167 (C.A. 5), re-

C. THE COMMISSION'S TEST, BUT NOT THAT OF THE COURT BELOW, PERMITS MEANINGFUL CONSIDERATION OF THE COMPETITIVE ADVANTAGES FLOWING FROM THE OPERATION OF THE "ADDITIONAL" GAS SYSTEM INDEPENDENT OF THE "PRINCIPAL" ELECTRIC SYSTEM

The court below read Section 11(b)(1)(A) in a quantitative rather than a qualitative sense. That is, it held that the test whether economies are "substantial" is whether they are sufficiently large—either in dollar amount or as a percentage of revenue or expenses—that reasonable men would deem them significant. On the other hand, as we have shown, the Commission, the Court of Appeals for the District of Columbia Circuit and the Congress considered that the test of substantiality turned on something more than mere size measured in dollars or percentages; *i.e.*, that losses in economies should not be deemed "substantial" unless they rose to the level that they would seriously interfere with the ability of the additional system to operate soundly and economically independently of the principal system. One important practical consequence of this difference in approach is particularly relevant to the present case and merits brief elaboration.

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versed on jurisdictional grounds, 353 U.S. 368, in which the court expressly refused to consider legislative history (235 F. 2d at 172) and, like the court below, gave no weight to the administrative construction. That case involved an appeal by a State regulatory agency from the Commission's refusal to reopen a Section 11(b)(1) proceeding. Since this Court ultimately held that the court of appeals was without jurisdiction to review the Commission's order involved there, the Fifth Circuit's disagreement with the Commission's interpretation has no legal consequence. See *In re United Corporation*, 184 F. Supp. 502, 511 (D. Del.), affirmed without consideration of this point, 283 F. 2d 593 (C.A. 3).

In the administration of the Holding Company Act, the issue of loss of substantial economies under Clause (A) has arisen principally in determining whether a holding company whose principal system is electric can retain a gas system. One of the evils that had resulted from the widespread control of public utilities by holding companies that had both gas and electric properties in their systems was the favoring of one of these competing forms of energy over the other.[24] Thus in discussing Section 8 of the Act (15 U.S.C. 79h), which prohibits a registered holding company, without the approval of a State regulatory commission, from taking any steps which result in its having an interest in both an electric and a gas utility serving the same territory in a State which prohibits such common control or requires State approval therefor, the Senate Committee explained (S. Rep. No. 621, 74th Cong., 1st Sess., 29) that the section was designed "to prevent the use of the holding company in the future to deny to the public wide-

[24] See, *e.g.*, the following colloquy in Hearings Before the Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess., 783:

> Senator COUZENS. * * * In other words, if the company found that it was more profitable to develop the electric light business than the gas business, they might block their gas business.
>
> Mr. BENTON. They might.
>
> Senator COUZENS. That is exactly what they do. I know of cases where they do it. * * *

See also Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 5423, 74th Cong., 1st Sess., 330; Report of National Power Policy Committee, H. Doc. No. 137, 74th Cong., 1st Sess., 10, appended to S. Rep. No. 621, 74th Cong., 1st Sess.

spread and economic use of both natural gas and electric energy merely because it is to the selfish advantage of a given company to foster the use of one of its products as against the other and deprive the public of the benefits of competition between the two * * *."[25] Noting that the original version of Section 8 "contained additional restrictions with regard to * * * the combination of gas and electricity in one system," the committee stated (*id.* at 7):

> This would have necessitated the disposing of certain interests held on the date the title became law, even before the provisions of section 11 became operative. The committee felt that while *the policy upon which this section was based was essential in the formulation of any Federal legislation on utility holding companies,* it did not think that the section should make it unlawful to retain (*up to the time that*

[25] See *Cities Service Power & Light Co.*, 14 S.E.C. 28, 65–66, for an illustration of neglect by a holding company of some of its gas operations because of its more profitable electric properties.

The Massachusetts Department of Public Utilities, which participated in this proceeding before the Commission in support of NEES, had stated in an earlier case (*Cambridge Gas Light Co.*, P.U.R. 1930 D, 263, 264–265) that it has been "deemed inadvisable that gas companies should engage in the electric business except under exceptional circumstances, and since 1910, it has been the policy of the commonwealth that no electric company should engage in the business of selling gas." More recently, in a proceeding involving the separation of the electric and gas properties of a NEES subsidiary, it repeated that its statute "illustrates the long-standing legislative preference for single-business gas and electric companies * * *." *Lynn Gas and Electric Co.*, 31 P.U.R. 3d 209, 212.

> *section 11 may require divestment*) interests in businesses in which the companies were lawfully engaged on the date of the enactment of the title. [Emphasis added.]

In the present case, the Commission recognized that joint control by NEES of both an electric and a gas system serving the same area could well lead to the favoring of one kind of service to the disadvantage of users of the other. It stated (R. 1274):

> Although the NEES Gas Division handles sales and promotional activities and various other matters for the gas subsidiaries separately from the electric companies, final authority on all important matters rests in the top NEES management. The basic competitive position that exists between gas and electric utility service within the same locality is affected by such vital management decisions as the amount of funds to be raised for or allocated to the expansion or promotion of each type of service. * * *

Of course, the significance of the competitive advantages that either a gas or electric utility and its customers gain when it is freed from the restraints likely to result from joint ownership or control cannot be precisely measured or defined. See *The North American Co.*, 18 S.E.C. 611, 615; cf. *Philadelphia Co.* v. *Securities and Exchange Commission*, 177 F. 2d 720, 724–725 (C.A. D.C.); *Lahti* v. *New England Power Ass'n*, 160 F. 2d 845, 851 (C.A. 1). Such advantages necessarily involve intangible factors—whether, for example, an independent gas system would have made

the same decision not to expand its facilities that was made for it by a holding company management that also controlled an electric system serving the same area, and what the effect upon the gas system of such an expansion would have been.

Thus, it would be wholly unrealistic to discount by a stated percentage or dollar amount a holding company's estimate of the losses in economies that would result from separation of gas and electric systems, in an attempt accurately to reflect the offsetting gains to competition that such separation would produce. Yet that apparently is precisely what the court of appeals would require the Commission to do in the present case. For the court, although recognizing that the Commission "had the right to consider competitive advantages of separation in offsetting alleged losses of economies," criticized the agency for its "failure to find or articulate any specific or approximate financial benefit that such a change would occasion" (R. 1469–1470). The Commission's interpretation of "substantial economies," however, avoids these difficulties and permits the agency to give effect in a meaningful way to the very real, although immeasurable, substantial competitive advantages that result from elimination of common holding company control of gas and electric systems without being required to perform the impossible task of making dollar predictions about an issue that is incapable of such precise definition.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1966.

APPENDIX

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, 15 U.S.C. 79a, *et seq.*

NECESSITY FOR CONTROL OF HOLDING COMPANIES

SEC. 1. (a) Public-utility holding companies and their subsidiary companies are affected with a national public interest in that, among other things (1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a large number of investors in different States; (2) their service, sales, construction, and other contracts and arrangements are often made and performed by means of the mails and instrumentalities of interstate commerce; (3) their subsidiary public-utility companies often sell and transport gas and electric energy by the use of means and instrumentalities of interstate commerce; (4) their practices in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage; (5) their activities extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies.

(b) Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to H. Res. 59 (Seventy-second Congress, first session)

and H.J. Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected—

* * * * *

(2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; when service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States;

* * * * *

(4) when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties; or

(5) when in any other respect there is lack of economy of management and operation of public-utility companies or lack of efficiency and adequacy of service rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital.

(c) When abuses of the character above enumerated become persistent and wide-spread the

holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is declared to be the policy of this chapter, in accordance with which policy all the provisions of this chapter shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this chapter.

DEFINITIONS

SEC. 2. (a) When used in this chapter, unless the context otherwise requires—

* * * * *

(29) "Integrated public-utility system" means—

(A) As applied to electric utility companies, a system consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility assets, whether owned by one or more electric utility companies, are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in

one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation; and

(B) As applied to gas utility companies, a system consisting of one or more gas utility companies which are so located and related that substantial economies may be effectuated by being operated as a single coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation: *Provided,* That gas utility companies deriving natural gas from a common source of supply may be deemed to be included in a single area or region.

U.S. GOVERNMENT PRINTING OFFICE:1956

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 636

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Petitioner,

v.

NEW ENGLAND ELECTRIC SYSTEM ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS

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*The provisions of Sections 1(b) and (c), 2(a)(29), 8, and 11(b)(1)(A)-(C) of the Public Utility Holding Company Act of 1935 are set forth in Appendix A to this brief.

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STATUTE INVOLVED

The following sections of the Public Utility Holding Company Act of 1935 (the "Act"[1]) are relevant and are set forth in Appendix A to this brief: Sections 1(b) and (c), the statement of purposes and policy of the Act; Sections 2(a)(29)(A) and (B), the applicable definitions of an "integrated public-utility system"; Section 8, the statement of the circumstances under which electric and gas utility companies serving the same territory may be acquired; and Section 11(b)(1)(A)-(C), the statement of the circumstances and conditions under which additional systems may be retained.

[1] 49 Stat. 803-38 (1935), as amended, 15 U.S.C. §79 (1964).

QUESTION PRESENTED FOR REVIEW

The Petitioner's[2] statement of the question presented seems to imply (i) that the meaning given in this case by the Securities and Exchange Commission to the phrase "substantial economies" is long standing and (ii) that the Commission's use of a test based on that meaning has been so extensive and consistent as to entitle it to special consideration by the courts, neither of which is accurate. The Respondents say that the question presented for review is:

> Do the common words "substantial economies" as used in Clause (A) of Section 11(b)(1) of the Act have their normal meaning, that is, economies which in ordinary business judgment would be regarded as important or significant considering the business to which they relate, the meaning which, in connection with Section 2(a)(29)(B) of the Act in this case, the Commission tacitly assumed for them and the Petitioner now urges for them (Br. 25);[3] or for the purposes of Section 11(b)(1)(A) alone are the words to be so construed that economies, however important, are not to be deemed substantial unless their loss would render the additional system incapable of sound and economical operation, a meaning which cannot be found in the words themselves and is not suggested by anything else in the Act?

STATEMENT OF THE CASE

The Petitioner's "Statement" (Br. 3-7) is inaccurate and incomplete in the following material respects:

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[2] In this brief the Securities and Exchange Commission as represented by counsel before this Court and the court below is generally referred to as the "Petitioner"; and otherwise it is referred to as the "Commission".

[3] "Significant savings" is the interpretation suggested by the Petitioner for purposes of Section 2(a)(29) (B) (Br. 25). (In this brief references to the Petitioner's brief on the merits are indicated by "Br."; references to the Petition for a Writ of Certiorari are indicated by "Pet.".)

1. *The Issue Under Section 2(a)(29)(B).* The Petitioner states that after deciding that NEES' electric utility subsidiaries constituted a single integrated system under Section 2(a)(29)(A),

> ". . . the Commission proceeded to hold further hearings, commencing May 18, 1960, on the question whether NEES' gas utility subsidiaries—which both NEES and the Commission's staff agreed to consider as constituting an 'integrated gas utility system' within the meaning of Section 2(a)(29)(B) [citations]—could be retained by NEES as an 'additional integrated public-utility system' under Section 11(b)(1)." Br. 4.

This implies, if it does not actually state, that the status of the NEES gas companies under Section 2(a)(29)(B) was not in issue at the hearings because the question had been settled before or at the beginning of the hearings and that for this reason the Commission did not have to enter any findings or conclusions or statement of reasons on this issue, as required by the Administrative Procedure Act.[4] Thus the Petitioner states:

> "The Commission did not in fact adjudicate the issue whether there were 'substantial economies' as used in Section 2(a)(29)(B) (which defines 'integrated gas system') but merely accepted its staff's concession that NEES's gas companies formed an integrated system as defined in that section, in order to expedite resolution of the critical question under Section 11." Br. 9.

The court below pointed out, however, that the Petitioner, as it recognized in its brief, was committed to the proposition that "fundamentally different meanings" must be given to the test of "substantial economies" under Sections 2(a)(29)(B) and 11(b)(1) (R. 1463).[5] The court

[4] See Section 8(b); 60 Stat. 242 (1946), 5 U.S.C. §1007(b) (1964).

[5] The statement in the Petitioner's brief below was that "NEES had urged this position [that the NEES gas companies constitute a single integrated gas utility system] (R. 23-24, 46-47, 49), the Commission's Division of Corporate Regulation [the staff] agreed (R. 772) and the Commission *so held* (R. 1256)." (Emphasis added.)

stated that "it stands that the Commission feels that saving $329,400 annually by integrating the eight gas companies is effectuating substantial economies under section [2(a)] (29)(B), but that $1,098,600 annually is not substantial economies under Clause (A)." R. 1463 n. 8.[6]

In view of the confusion now created, the following relevant procedural facts should be noted:

(a) Whether the gas utility companies constituted one or more integrated systems under Section 2(a)(29)(B) was one of the principal issues in the case, and was recognized as such at the hearing. This issue was specifically included in the Commission's Order of Notice, which first stated the corresponding issue relating to the electric utility assets in exactly the same terms, and which also specified the issue under Section 11(b)(1) relating to the retention of any additional systems (R. 20; see also R. 40). There was no stipulation or agreement on the Section 2(a)(29)(B) issue, and at no time did either the staff or the Respondents even suggest disposing of it otherwise than through appropriate findings by the Commission in the regular way. The Respondents introduced extensive evidence relating to this issue (see, *e.g.*, Res. Ex. 58A; R. 131, R. Vol. IV; R. 772-73),[7] and at the hearings the staff insisted that determination of the issue under Section 2(a)(29)(B) was a necessary and orderly first step before decision of the issue under Section 11(b)(1) (R. 270-71, 767-68; see also 1263-64 n. 13). In fact, it was not until May, 1961, approximately one year after completion of the Respondents' affirmative case (not at the beginning of the hearings as the Petitioner's brief implies), that the Commission's staff for

[6] In this brief the opinion of the court below is cited by reference to the page numbers of the opinion as reprinted and included in the record for this Court.

[7] "R. Vol." refers to Volume IV, V or VI of the record which are the three volumes of the Ebasco Report. They summarize the severance study made by Ebasco Services, Inc., a firm qualified and experienced as experts in the utilities field. (See R. 1263, 1466, 1469.) The volumes were specified in the Respondents' cross-designation mailed for filing on December 30, 1965.

the first time disclosed its intention at an appropriate time to urge the Commission (R. 772) to make the determination that the NEES gas companies are a single integrated system. In its brief filed with the Commission after the hearings the staff did in fact urge the Commission to make that determination.

(b) The Ebasco Report and related exhibits and testimony which constituted the major portion of the Respondents' evidence showed that if the NEES gas companies were not a single integrated system and had to be operated independently of each other as well as independently of NEES, the annual loss of economies to the gas companies would be $1,495,000 (See Res. Ex. 58A; R. 131, R. Vol. IV; Res. Ex. 59; R. 132, R. 1311). The evidence also showed that if the NEES gas companies were a single integrated system and could be operated together with each other but had to be divested by NEES, the annual loss of economies to the gas companies (as adjusted by the Commission) would be $1,098,600 (R. 1264-65).[8] On the basis that the gas companies were a single integrated system, the Commission refused to consider the larger amount on the ground that it was irrelevant (R. 1263-64 n. 13).

2. *The Commission's Handling of the Evidence.* The "Statement" says, "The Commission found that NEES's

[8] The Ebasco Report showed that the annual loss of economies to the gas companies as a single system would be $1,165,600 (Res. Ex. 91 p. 40; R. 564, R. Vol. VI p. 40). However, NEES also introduced evidence indicating that a change in service company charges authorized by the Commission in December, 1959 would have reduced the loss to the gas companies by $67,000 if it had been in effect in 1958 (R. 364-79), and as noted above the Commission reduced the Ebasco estimate by this amount. Since the evidence otherwise related to 1958 (and to a limited extent 1959), the Commission's adjustment for a change effective beginning in 1960 was retroactive. However, it was minor and in itself might have been correct if the $804,800 annual loss of economies which the evidence showed the electric companies would bear as a result of severance were to be correspondingly increased by $67,000. (See R. 374-75. See also Res. Ex. 58B; R. 131, R. Vol. V; Res. Ex. 60; R. 133, R. 1313). The adjustment also raised the question whether one retroactive adjustment should be made without review and evaluation of other post-1958 developments.

estimate of the loss of economies following from divestiture was exaggerated . . ." (Br. 6). It follows with a lengthy footnote on this point (Br. 6 n. 5).

The "Statement" fails to point out that in its Findings and Opinion the Commission rejected the Ebasco estimate in its entirety for purposes of Section 11, not merely that it considered the evidence exaggerated (R. 1268). It also fails to point out that the Commission's handling and evaluation of the evidence were in issue before the First Circuit, which criticized the Commission's treatment of the evidence in numerous respects, and gave specific and careful instructions as to the correct methods to be followed by the Commission on remand (R. 1466-70).

3. *The Claim that the Test Now Urged is Long Standing.* As to the Commission's holding that $1,098,600 annually was not "substantial economies" for the NEES gas companies the "Statement" says:

> "In so holding, the Commission interpreted the relevant provision [Clause (A)], as it had done in prior divestment cases dating back more than twenty years, to require a showing that each 'additional system cannot be operated under separate ownership without the loss of economies so important as to cause a serious impairment of that system' (R. 1262-63). Under this test, the Commission ruled that, on the basis of the record before it, it was unable 'to find that the gas companies could not be soundly and economically operated independently of NEES***' (R. 1279)." Br. 7.

In its Petition for a Writ of Certiorari the Petitioner claimed much more. There it said that its test was the same as "it had applied in every other divestiture case under Section 11(b)(1)" (Pet. 5); that under the test "more than $2,000,000,000 in utility assets have heretofore been divested on orders of the Commission" (Pet. 12); and that decisions of the Commission applying the test stretched uninterrupted through thirteen cited cases back to the first opinion on the question in 1942 (Pet. 12, 26a).

The present "Statement" suggests that the test now urged by the Petitioner is not the same as has been applied in all prior cases. The Respondents concur. The present test has been stated in no more than three of the thirteen cases cited in the Petition, involving less than 7½% of the total assets stated in the Petition to have been divested in relevant cases. In none of them does it appear to have been dispositive of the issue. (See pp. 45-48 and Appendix B to this brief.)

4. *Participation of the Massachusetts Department of Public Utilities.* The "Statement" contains no reference to the fact that the Massachusetts Department of Public Utilities (the "DPU"), which has jurisdiction over and regulates both gas and electric companies in Massachusetts, including all of the NEES gas companies, intervened as a party in the proceedings before the Commission and strongly opposed divestment of the gas companies. The Chairman of the DPU testified at length to the effect that in Massachusetts joint ownership or operation of gas and electric utilities is in no way contrary to public policy, that each case depends on its own circumstances, that 16 of 26 gas companies in Massachusetts are either combination gas and electric companies or under common control with electric companies, and that in the case of the NEES System there had been no suppression of one business in favor of the other. To the contrary, the DPU's experience with the System indicated that the gas and electric businesses had each been "aggressively developed and efficiently operated", as evidenced by the favorable rate of growth of each. The Chairman pointed out that in Massachusetts gas companies are in an "economic squeeze" because the cost of gas piped from the southwest is relatively high, and gas and fuel oil (oil being shipped by water is relatively cheap) compete intensely for home heating, the principal market for gas. The view of the DPU was that divestment would be adverse to the interests of the residents of Massa-

chusetts, and might necessitate increased gas rates; that it would not achieve any benefits but would result in the impairment of service and the loss of substantial economies; and that the loss would fall ultimately on the consumers (R. 41-42, 581-82, 587-94).

SUMMARY OF ARGUMENT

The Holding Company Act is a business regulatory statute written in simple and unambiguous language. It contains a clear and specific statement of its objectives and policy, and of the procedure for implementing them. It can be and should be applied without distortion of its provisions.

The specific issue in this case is the meaning of the phrase "substantial economies" as used in Section 11(b)(1)(A), which states one of the conditions for common control of more than one integrated public-utility system. The same phrase appears in a similar context in Section 2(a)(29)(B), as a requirement in the definition of an "integrated public-utility system" consisting of one or more gas companies.

In the proceedings before the Commission, the test of "substantial economies" in both Sections had to be applied to the eight NEES gas companies — under Section 2(a)(29)(B) in determining whether they could be held together with each other in a single integrated system, and under Section 11(b)(1)(A) in determining whether they could be held together with the NEES electric companies in a single holding company system. There was no question that all other requirements were met.

The evidence showed that operation of these gas companies together with each other resulted in economies of $329,400 a year, and that operation of them together with the electric companies resulted in economies of $1,098,600 a year. On this record, the Commission "conceded" that the eight gas companies constitute a single integrated

public-utility system, thereby recognizing and in effect holding that for them economies of $329,400 are "substantial" under Section 2(a)(29)(B). It then held that economies for the same companies of $1,098,600 are not "substantial" under Section 11(b)(1)(A). (See R. 1256, 1269).

In conceding the issue under Section 2(a)(29)(B) instead of entering the appropriate findings and conclusion, which would have directed its attention to the crucial inconsistency of its position, the Commission ignored the requirements of the Administrative Procedure Act and its own Order of Notice, reversed its well established practice, and acted inconsistently with its action on other parallel issues in the same case, all without explanation. Successive explanations have since been offered, but each of them involves further inconsistencies and other difficulties. This aspect of the case alone warrants remand to the Commission for further appropriate proceedings.

The Commission's treatment of the issue under Section 11(b)(1) is correspondingly defective. In its Findings and Opinion it stated so many standards under Clause (A) that the court below had difficulty in determining the actual basis of the decision. It concluded that the Commission had construed the phrase "substantial economies" to mean economies whose loss "would render impossible 'economical or efficient operation.'" R. 1458. The Petitioner now substitutes "sound and economical operation", although its brief states that in all prior cases the Commission has construed the phrase to mean economies the loss of which would "cause a serious impairment of that [the additional] system" (Br. 7), a materially different test.

The test of incapability of sound and economical operation represents a radical departure from the normal meaning of the phrase "substantial economies". It requires a different line of inquiry — an examination of the operational capability of the system after separation rather than

a comparison of operations before and after separation. It is a substitution of a different test which the Commission thinks is a better test but which cannot be found in the language of the Act.

The Petitioner's interpretation of the Act is evidently based on a preconceived assumption that the Act reflects an overriding federal policy against retention of more than one integrated public-utility system, and particularly against combination of gas and electric operations. It assumes this policy to be so strong as to require whatever distortion of specific provisions of the Act may be necessary to give it maximum effect. Thus a special meaning for the phrase "substantial economies" in Clause (A) of Section 11(b)(1) should be used, the Petitioner in effect argues, since otherwise that Section specifically permits combinations contrary to the assumed policy. Yet the same phrase in Section 2(a)(29)(B) can be given its normal meaning because "an entirely different policy" applies (Br. 25). The Respondents submit that the two Sections implement the same federal policy, which is carefully stated in Section 1 and is not the policy now urged by the Petitioner.

The Petitioner's argument is in striking contrast to the Commission's statement in its Findings and Opinion below (R. 1277) that it does not take the view that the Act expresses a federal policy against combined gas and electric operations as such; and it ignores strong evidence in the Act and its legislative history indicating that Congress intended to leave this question to the individual states, and limit its own concern to preventing the use of holding companies to circumvent state law and policy.

The legislative history, even as summarized by the Petitioner, is not helpful to its position. Congress not only refused to adopt the original bills embodying the harsh policy now favored by the Petitioner, but it took the precaution to forestall the Commission's achieving the same

result in administrative practice, as it is now attempting to do, by providing in Section 11(b)(1) that the Commission *shall* permit retention of additional systems if specific conditions are met.

The Petitioner's chief reliance is on a single remark of Senator Wheeler. The remark, however, was made after the Act was passed, by an opponent of the compromise embodied in it. Under these circumstances, as the court below suggested, the Senator's statement is entitled to little if any weight.

So far as the Act itself is concerned, the Petitioner cites two phrases taken out of context and completely misconstrues them (Br. 17, 20). If the entire subsections from which they were taken are examined, it is clear that the phrases do not relate to the question presented in this case.

The Petitioner's novel suggestion that its test should be favored because it permits giving effect to certain assumed competitive advantages is troublesome in several ways. The ability to take into account particular factors should have no bearing on the determination of what the test is. The test should first be determined from the Act itself, and that in turn determines what factors are relevant. Furthermore, no explanation is given as to how or why the competitive advantages or disadvantages of independence, can be given more meaningful consideration under the Commission's test than under the court's test. Just the reverse would appear to be true.

Finally, the Petitioner claims that the "Commission's longstanding interpretation is entitled to great deference." Br. 26. A crucial difficulty with this argument is that the various tests used by the Commission have been so loosely and inconsistently stated that it is difficult to interpret and evaluate the decisions of the Commission, or even of the reviewing courts. Any semblance of uniformity depends on treating as synonymous a variety of words and phrases

having a wide range of meanings, and it completely disappears when exact meanings are brought into focus.

Over the years and even in this case, the Commission has announced so many tests that it cannot be said that there is a specific Commission interpretation, long standing or otherwise. In only a small percentage of the Commission's decisions cited in its Petition for Certiorari has the Commission even stated the test now urged, and in none of them does it appear that this test was determinative of the issue.

In the courts, in earlier cases, the Second Circuit approved a test based on the importance of the economies, and the Court of Appeals for the District of Columbia in two subsequent cases appears to have followed this test or developed an intermediate test, but in neither was it determinative of the issue. The Fifth Circuit and (in the decision under review) the First Circuit have been the latest to consider the meaning of "substantial economies". Both have unanimously rejected the Commission's present test.

ARGUMENT

I. The Holding Company Act Sets Forth in Clear and Unambiguous Language a Comprehensive, Rational and Self-Consistent Plan of Regulation which should be Administered according to its Own Terms.

The Act was designed to combat certain evils which had come about in connection with the abnormal and unregulated growth of holding companies in the public utility industry. Section 1 itemizes these evils and declares it to be the policy of the Act, "in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section . . . ."

The subsequent sections provide the machinery for implementing the policy declared in Section 1 by bringing

each holding company system into conformity with specified standards and then regulating subsequent acquisitions and other activities in the manner and to the extent specifically provided.

1. The Act is a Business Regulatory Statute Using Well Understood Business Terms and its Meaning is Clear.

The Act was intended to effect extensive reorganization and continuing regulation of one of the major industries of the United States — "the rationalization of an industry", to use former Commission Chairman Cary's description.[9] It directly affected business, and was written in simple everyday English words having well understood meanings in the business world. Where technical or special terms were required they were clearly defined. Legislative history makes it clear that the Act was intended to accomplish its purpose "without undue dislocation of investment or the loss of operating economies which flow from economically and geographically integrated public-utility systems." (See pp. 25-26 below.)

The specific issue in this case is the meaning of the phrase "substantial economies," as used in Section 11(b)(1)(A) of the Act. The Respondents say it means economies or savings which are important or significant in relation to the business involved, the connotation it would unquestionably have in ordinary business parlance. The Petitioner says it means the difference, however large or significant the amount may be, between capability and incapability of sound and economical independent operation, and it rephrases the test accordingly.

The Respondents contend that under established principles of statutory construction, the words of the Act are

[9] Cary, *Administrative Agencies and the Securities and Exchange Commission*, 29 Law & Contemp. Prob. 653, 655 (1964).

presumed to have their normal and usual meanings, and specifically that identical words and phrases in closely related sections have the same meanings. Any departure from this principle would require compelling reasons, which as shown below (pp. 22-51), are not here present.

2. The Petitioner's Test under Section 11(b)(1)(A) is Outside Any Normal Meaning of the Language of the Statute and Involves Fatal Inconsistencies.

The Petitioner's test is not properly described as an interpretation or construction of the phrase "substantial economies". It is a substitute — a new standard which is materially different from the one adopted by Congress. The difference is not one of degree or strictness. It is a difference of kind.

The Petitioner's test requires an examination of the pro forma operation of the additional system as an independent system, and nothing more. If it cannot be proved by "clear and convincing evidence" (to use the Commission's phrase (R. 1262)) that the additional system is incapable of operating soundly and economically as an independent system, the Commission requires divestiture. Specifically what is meant by operating "soundly and economically" is not explained.[10] But whatever the meaning, under the Petitioner's test the size and the importance of economies produced by existing combined operation, and the impact of the loss of those economies on consumers and investors, are irrelevant.

This result is contrary to the ordinary meaning and plain intent of the words "substantial economies". The word "economies" connotes savings, and there are no

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[10] The court below considered it a serious problem, which, however, it did not have to reach, that the Commission had failed to explain the standard "by which uneconomical operation is determined." R. 1458 n.5, R. 1461 n.7.

savings and hence no economies unless one situation, when compared with another, represents an improvement. "Substantial" is a relative term and in a legal context it means important or significant. Together the words convey a clear intent to require an evaluation of the importance or significance of the savings, the difference between the two situations, in light of all the circumstances.

The Petitioner's test is markedly inconsistent with the method of decision which the Commission has regularly used in other cases and apparently actually used in this case. (See R. 1282, Br. 34.) Here the Commission first measured the projected annual loss of economies in percentages of the NEES gas system's annual operating revenues, operating revenue deductions (excluding federal income taxes), gross income and net income before federal income taxes. It then compared these ratios in detail with similar ratios which it had used to test the substantiality of economies in certain earlier cases (R. 1269-70, 1282). Thus, it has appeared that the dollar size and related percentages of the losses went to the heart of the Findings and Opinion in this case as well as prior cases. The Petitioner's present position must mean that the ratio tests the Commission said it was using were not the real basis for its decision either in this case or the cited prior cases, and that the Commission was performing an essentially meaningless task.[11]

If Congress had intended the result which the Petitioner now urges, it cannot be doubted that the expert draftsmen of the Act would have stated that intention clearly and

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[11] In particular it should be noted that when it reviewed the evidence relating to NEES's estimate that rate increases of about $1,500,000 would be necessary to avoid reduction in the earnings of the gas companies after severance, the Commission stated that the test of Section 11(b)(1) "is not based on reduction in earnings upon severance but solely upon whether the increased operating costs occasioned by severance are 'substantial'." R. 1273.

simply and indeed in fewer words. Clause (A) would have read:

> *"(A) Each of such additional systems cannot be soundly and economically operated as an independent system."*[12]

The requirements of Clauses (A), (B) and (C) of the *proviso* were not a mere legislative afterthought. As explained below in detail (see pp. 26-30), insertion of the *proviso* containing them was the key step in the passage of the Act. The three elements of the *proviso* — the limitation of operations to a single geographic area, the limitation on size and the test of economic justification — closely parallel, in both substance and form, the corresponding elements in the definitions of an integrated public-utility system set forth in Section 2(a)(29):

(i) *The geographic limitation:* The definitions in Section 2(a)(29) require that the operations of an integrated system be confined to a single area or region; Clause (B) of the *proviso* in Section 11(b)(1) requires that all of the additional systems be located "in one State [in which the principal system also operates[13]], or in adjoining States, or in a contiguous foreign country. . . ."

(ii) *The size limitation:* Both the definitions and Clause (C) of the *proviso* require in virtually identical terms that operations be "not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation".

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[12] This restatement of Clause (A) merely inserts the Petitioner's phrase "soundly and economically" and deletes the phrase actually used: "without the loss of substantial economies which can be secured by the retention of control by such holding company of such system".

[13] See Engineers Pub. Serv. Co. v. SEC, 138 F.2d 936, 941-43 (D.C. Cir. 1943), *cert. granted*, 322 U.S. 723 (1944), *dismissed as moot*, 332 U.S. 788 (1947).

(iii) *The economic justification:* Both the definitions and Clause (A) of the *proviso* require economic justification for continued combination. The definition of an integrated gas utility system in Section 2(a)(29)(B) does not require that the gas companies be physically interconnected or capable of physical interconnection, as such interconnection is not ordinarily beneficial, but it requires that "substantial economies" be effectuated by the gas companies being operated as a single coordinated system. Clause (A) of the *proviso* does not require physical interconnection or capability of physical interconnection as ordinarily such interconnection would not be feasible or beneficial, but it has the same requirement of "substantial economies". The definition of an integrated electric system in Section 2(a)(29)(A) is different and reflects technical advantages of interconnection available in electric operations: it requires physical interconnection (or capability of physical interconnection), and if that advantage is present, it requires only that the electric facilities normally may be economically operated as a single interconnected and coordinated system (not necessarily effect substantial economies).[14]

If, as the Petitioner now argues, capability of sound and economical operation is the test under Clause (A), an integrated gas utility system can never be retained as an additional system, whether the principal system is gas or electric. By definition the additional gas system must

[14] The different standard for electric systems reflects the fact that by interconnection an electric system realizes economies and other benefits from joint use of generation facilities, power interchange, common dispatching and the like. With these technological advantages present, other economies, such as those resulting from common management and operation of non-interconnected properties, need not be "substantial" under the Act in order to justify the properties being allowed within one system. Thus despite the Petitioner's assertion to the contrary (Br. 26 n. 19), Congress did have a valid reason for imposing somewhat different standards for integration of an electric system as compared to a gas system.

consist of one or more gas companies so located and related that substantial economies may be effectuated by their being operated as a single system. To achieve those economies, the gas companies have to be *capable* of operating together economically. But if they are capable of operating together economically and so are an integrated system, they must in all cases be separated from the principal system because under the Petitioner's test the only additional system which may be retained is one which is *incapable* of sound and economical operation.

The geographic, size and economic tests of Sections 2(a)(29) and 11(b)(1) of the Act clearly should be construed consistently, as should in particular the phrase "substantial economies", which appears in both Sections. To do so is not only logical; it gives effect to the recognized rule of statutory construction that the same word or phrase appearing in different parts of a single statute is presumed to have the same meaning. *United States* v. *Cooper Corp.*, 312 U.S. 600, 607 (1941). This presumption should be particularly strong where, as here, the identical phrase ("substantial economies") not only appears in the two Sections but is incorporated by reference into Section 11(b)(1) through that Section's use of the defined term "integrated public-utility system". The draftsmen of the *proviso* in Section 11(b)(1) must have intended the words they used to have the same meaning there as in the definitions in Section 2(a)(29), as the most important use of the defined term "integrated public-utility system" in the Act unquestionably is in the application of Section 11(b)(1).

The Commission has recognized the rule of statutory construction stated in *Cooper*, and until this case has followed the rule when it compared corresponding provisions of the two Sections.[15] It stated to this Court in its reply brief defending its interpretation of Clause (A) in *Engineers:*

[15] See North American Co., 11 S.E.C. 194, 214 (1942), Cities Serv. Power & Light Co., 14 S.E.C. 28, 59 (1943), and Commonwealth & Southern Corp., 26 S.E.C. 464, 488-89 (1947) (involving

"Indeed the relationship of dependence required for retention is particularly clear in the case of gas properties because the definition of a single integrated system in Section 2(a)(29)(B) applicable to gas properties substantially overlaps the standards of the (A) and (C) clauses of Section 11(b)(1), as they apply to additional systems. Thus it is clear that Congress intended the relationship between a single system and an additional system should be comparable to that between parts of the same system . . . ."[16]

In an attempt to avoid the obvious inconsistencies, the Petitioner has first suggested that there was an agreement or stipulation on this issue (there was none), and alternatively suggests that the "Commission did not in fact adjudicate the issue" under Section 2(a)(29)(B), "but merely accepted its staff's concession" (Br. 4, 9). For this reason, the Petitioner argues, it is unfair to "tax the Commission with inconsistency" (Br. 23).

The established practice of the Commission under the Act, however, has not been to accept without question and

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Section 2(a)(29)(A) and clause (C) of Section 11(b)(1)). See also Lone Star Gas Corp., 12 S.E.C. 286, 295 (1942), and United Gas Improvement Co., 9 S.E.C. 52, 72 (1941). The Petitioner now takes a contrary view (Br. 23-24), and suggests that Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427 (1932), supports its view. That case, however, stands for the proposition that while there is a natural presumption that identical words appearing in the same statute are intended to have the same meaning, this presumption can be overcome when the words appear in two separate sections of a single statute in which Congress intended to exercise to the fullest extent two different constitutional powers, one of which is significantly more extensive than the other. In that situation, the Court stated that it would construe the two sections as if they were in different statutes and interpreted each section so as to give each maximum effect within the applicable constitutional provision despite the fact that to do so resulted in similar words in the two sections being dissimilarly construed. See 286 U.S. at 433-35.

[16] Reply Brief for Commission pp. 19-20, Engineers Pub. Serv. Co. v. SEC, *cert. granted,* 322 U.S. 723 (1944), *dismissed as moot,* 332 U.S. 788 (1947).

take no responsibility for a staff concession. In prior cases, the Commission has considered that its statutory duties could not be properly carried out in this way. In appropriate cases the Commission has rejected the concurrence of its staff and the respondent involved and has reached a contrary conclusion. For example, in *Cities Service,* counsel for the Commission's staff and for Cities Service concurred in recommending that the Commission find certain non-utility businesses retainable under the standards of Section 11(b)(1). But the Commission reached a different result and stated, quite rightly, that:

> "The concurrence of counsel, however, does not change our statutory duties. We may make the affirmative findings necessary to permit retention of a nonutility business only if the record shows that such retention satisfies the criteria of Section 11(b)(1)." *Cities Serv. Power & Light Co.,* 14 S.E.C. 28, 38 (1943).[17]

In other words, the Commission in its actual practice has recognized that, as noted by the court below, it "could not, either in good conscience or in law, accept as a concession a matter [that is, the gas companies' status under Section 2(a)(29)(B)] so fundamental, not only to the present proceedings, but for the future, if it were contrary to the fact" (R. 1463 n. 8). For that reason, even when the Commission has chosen to follow the recommendations of its staff on material issues under the Act, it has been careful to state its reasons and the necessary subsidiary findings. The Commission did just that both in its Findings and Opinion with respect to the electric phase of this case (where the staff did not oppose the Respondents' position), and in its Findings and Opinion with respect to the issues under Clauses (B) and (C) of Section 11(b)(1) in the gas phase of this case, where the staff also did not oppose the Respondents' position.[18]

[17] See also Middle West Corp., 15 S.E.C. 309, 329, 334 (1944); Northern States Power Co., 36 S.E.C. 1, 5, 8-10 (1954).

[18] See R. 27-38; New England Elec. Sys., 38 S.E.C. 193 (1958); R. 769, 1260-61; see also General Pub. Util. Corp., 32 S.E.C. 807, 814-15 (1951).

The Respondents do not disagree with the Petitioner's suggestion that it is desirable to narrow the issues and limit the evidence in administrative hearings through such procedures as responsive pleadings and pre-hearing conferences which could lead to appropriate stipulations. (See Br. 9, 2-23.) The problem is that here there was no stipulation, nor was the issue eliminated by the pleadings or by any pre-hearing conference. The Respondents had the burden of proof and introduced their evidence. The Commission had the duty to adjudicate, and under the Administrative Procedure Act to state the necessary findings and its reasons.[19] Had the Commission met that duty, it would presumptively have recognized the inherent inconsistencies in its Findings and Opinion.[20]

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[19] "All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof." Section 8(b); 60 Stat. 242 (1946), 5 U.S.C. § 1007(b) (1964). The Petitioner cites a proposed amendment of the Administrative Procedure Act as being consistent with its claim of no adjudicatory responsibility (Br. 23 n.18), but even if that amendment were in effect, it would not help the Petitioner's case. Agreements or admissions still would be required to narrow the issues, and findings and conclusions and reasons would still be required in decisions. See Sections 2(d), 5 and 8(b) of S. 1336, 89th Cong., 1st Sess. (1965). The proposed legislation contemplates, with certain safeguards, agency delegation of adjudicatory functions (Section 8). Of course, that procedure was not available here. However, in 1962 special legislation was passed which authorized the Commission to delegate various duties but in this case the Commission in no way followed the prescribed procedure for delegation of its adjudicatory duties. See 76 Stat. 394 (1962), 15 U.S.C. § 78d-1 (1964); see also Rule 8(a) of the Commission's Rules of Practice. 17 C.F.R. § 201.8(a) (1964).

[20] Assuring careful and reasoned administrative consideration is one of the several well recognized "powerful" and "practical reasons" for the requirement of administrative findings. 2 Davis, *Administrative Law* §16.05 (1958). As this Court has noted,

II. None of the Reasons Advanced by the Petitioner Warrants Distorting the Normal Meaning of the Act and Substituting a Different Standard for that Prescribed in Clause (A).

There is a natural presumption that the phrase "substantial economies" as used in the Act is intended to convey the normal and generally understood meaning of the words. In particular cases there may be need for interpretation as to the degree of substantiality intended and for this purpose resort to legislative history or other aids to interpretation may be appropriate. Under no circumstances, however, can this impose on language a meaning which is opposed to, or outside the widest scope of, its normal meaning. See *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 616-618 (1944). The Respondents contend that this is exactly what the Petitioner is attempting to do in this case. For that purpose the Petitioner offers several reasons, not one of which has any validity.

1. Neither the Act Itself nor its Legislative History Supports the Petitioner's Test under Clause (A).

The Petitioner's case proceeds on the premise that under the Act, and Section 11(b)(1) in particular, the "primary aim" and "basic congressional purpose" are to "restrict a holding company's control over operating utility companies to one integrated public utility system," (Br. 8, 9), or to "limit holding companies to a single integrated sys-

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"Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.' *New York* v. *United States*, 342 U.S. 882, 884 (dissenting opinion)." Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 (1962).

tem" (Br. 25). This idea is basic to the Petitioner's argument. Repeatedly the point is made: a requirement for one integrated system is said to be the "theme" of the Act (Br. 8); its "basic provision" (Br. 12); the "cardinal principle" (Br. 17); and the "basic congressional plan" (Br. 25).

This bold assumption colors the Petitioner's entire interpretation of the Act and is cited as justification for giving identical words radically different meanings in two closely related sections (Br. 9, 24) and for otherwise distorting the normal meaning. No valid support for it is offered by the Petitioner or is to be found either in the Act or in its legislative history. Yet the Court is asked to make the same assumption.

(a) *The Act.* Obviously the first and most important place to look for the policy and purposes of legislation is in the legislation itself. If the language is clear and unambiguous, there is normally no need to look further.

In the instant case the Act is unusually clear and specific in declaring its policy and specifying its purposes. They relate solely to the elimination of specific enumerated evils. Restrictions on holding companies are means to an end and not an end in themselves. The conditions and limitations under which they are to be applied are clearly stated in the Act and should be fairly and impartially construed. Section 11(b)(1) is not a statement of policy. It is one of several mechanical or operative provisions designed to implement and carry out the policy and purposes of the Act as detailed in Section 1.

The Petitioner contends that the use of the *proviso* in Section 11(b)(1) should be interpreted as indicating an intention to make a "narrow" exception (Br. 8, 12, 15, 17) which is to be strictly construed (Br. 13). This would be questionable under any circumstances and is wholly invalid

in the present context. The particular form of this section was dictated by its legislative history. The original bills in both branches provided for the complete elimination or severe limitation of all holding companies. After careful consideration and extensive public hearings and debate, a material modification took place. The *proviso* was used as an obvious and convenient mechanical method of carving out of the general limitation those situations in which additional systems could be retained consistently with the basic purposes of the Act. Without this modification the legislation would have failed of enactment. Those who voted for it had a right to assume that the language would be fairly interpreted and that the compromise would not be scuttled by distortion of that language.

The Petitioner criticizes the decision of the court below as overemphasizing the business or economic factor in its interpretation of this part of the Act. Actually this is the one factor to which Clause (A) relates. The major considerations of size and geographic distribution are covered by Clauses (B) and (C). A careful reading of the Act as a whole, and particularly of Section 1, can leave no doubt that economy in management and operation was of vital concern, meaning by this, net economy after giving effect to all plus and minus items.

(b) *Legislative History.* The enumeration of evils in Section 1(b) is based on the facts disclosed by various detailed reports, including particularly the reports of the Federal Trade Commission after what has been described as "the most thorough-going investigation of an American industry that has ever appeared",[21] and, in addition, the so-called Splawn Report issued in 1934 and 1935 by the

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[21] Barnes, *The Economics of Public Utility Regulation* 71 n.8 (1942).

House Committee on Interstate and Foreign Commerce.[22] After these reports, in March, 1935, President Roosevelt requested remedial legislation with respect to public-utility holding companies, and transmitted to Congress a report of the National Power Policy Committee. This report summarized the problem as follows:

> "The growth of the holding-company systems has frequently been primarily dictated by promoters' dreams of far-flung power and bankers' schemes for security profits, and has often been attained with the great waste and disregard of public benefit which might be expected from such motives. Whole strings of companies with no particular relation to, and often essentially unconnected with, units in an existing system have been absorbed from time to time. The prices paid for additional units not only have been based upon inflated values but frequently have been run up out of reason by the rivalry of contending systems. Because this growth[23] has been actuated primarily by a desire for size and the power inherent in size, the controlling groups have in many instances done no more than pay lip service to the principle of building up a system as an integrated and economic whole, which might bring actual benefits to its component parts from related operations and unified management. Instead, they have too frequently given us massive, overcapitalized organizations of ever increasing complexity and steadily diminishing coordination and efficiency."[24]

The National Power Policy Committee recommended:

> ". . . Federal legislation regarding public-utility holding companies. Such legislation should eradicate disclosed abuses, prevent the use of the holding company and affiliated interests to obstruct State regulation of operating companies, and make possible the elimination of the

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[22] H.R. Rep. No. 827, 73d Cong., 2d Sess., Parts 1-6 (1933-35). See Commissioner Splawn's summary appearing in Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st Sess. 55-56 (1935).

[23] Not all growth of holding companies, as suggested by the Petitioner's partial quotation in its brief (Br. 13).

[24] H.R. Doc. No. 137, 74th Cong., 1st Sess. 5 (1935).

holding company where it serves no demonstrably useful and necessary purpose, without undue dislocation of investment or the loss of operating economies which flow from economically and geographically integrated public-utility systems.''[25]

Neither the President nor the National Power Policy Committee condemned holding companies as such, nor did they seek legislation which would eliminate the advantages of geographically and economically integrated systems. The President did vigorously condemn large and sprawling utility holding companies which performed no demonstrably useful or necessary function but rather existed simply as a means of achieving and maintaining financial control over operating public utilities.[26]

Senate hearings followed and then in May, 1935, Senator Wheeler introduced the Senate version (S. 2796) of the bill and filed with it the report of the Senate Committee on Interstate Commerce, of which he was Chairman.[27] As had the earlier reports, the report of this committee made it clear that the principal purpose of the legislation was to restore regional integration, local management and effective local regulation. Under the Senate version as introduced by Senator Wheeler a regionally integrated public-utility system was exempt from the elimination provisions of Section 11. A regionally integrated combined gas and electric system, such as NEES, was entirely consistent with

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[25] *Id.* at 8. It was recognized at the subsequent Senate hearings that in New England a holding company serves a particularly useful purpose because the states are small and the holding company is ''necessary to hold together the desirable regional operating units''. See the testimony of Thomas G. Corcoran, Hearings Before the Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess. 165, 203-04 (1935).

[26] H.R. Doc. No. 137, 74th Cong., 1st Sess. (1935).

[27] S. 2796; S. Rep. No. 621, 74th Cong., 1st Sess. (1935). S. 2796 extensively revised the form but preserved the substance of S. 1725 and H.R. 5423, the original bills, which had been filed with the Senate and House in February, 1935.

the purposes of the legislation, not an evil condemned by it:[28]

> "An operating system whose management is confined in its interest, its energies, and its profits to the needs, the problems, and the service of one regional community is likely to serve that community better, to confine itself to the operating business, to be amenable to local regulation, to be attuned and responsible to the fair demands of the public, and more often to get along with the public to mutual advantage. A regional system, with each company confined to consolidation of its own territory, will offer no chance for the territorial raids at fantastic prices with which for 15 years competing holding company systems disturbed the operating business. Essentially local systems will tend to operate utilities rather than to play with high finance; and essentially local enterprise is far less likely to accumulate a disproportionate amount of political and economic power." S. Rep. No. 621, 74th Cong., 1st Sess. 12 (1935).

The Senate version of Section 11(b)(1) (S. 2796) was the strict version. It would have limited all registered holding companies to a single "geographically and economically integrated public-utility system". Such a single system, however, could have included both electric and gas properties.[29]

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[28] See Representative Eicher's comment that, ". . . essentially intrastate holding companies, like Niagara-Hudson and Pacific Gas & Electric, and holding companies necessary for the operations of an interstate but regionally integrated public-utility system, like New England Power Association [the former name of NEES], are exempted from the elimination provisions of section 11 of the Senate bill . . . ." H.R. Rep. No. 1318, 74th Cong., 1st Sess. 49 (1935).

[29] S. 2796 § 11(b)(1)-(3), as passed by Senate and sent to House June 13, 1935. See United Gas Improvement Co., 9 S.E.C. 52, 82-83 (1941); Hearings before the Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess. 494-500, 515, 626-30 (1935). This was also true under the bill as initially introduced in both the Senate and the House. See S. 1725 § 11(b)(2) and (4)(1935) and H.R. 5423 § 10(b)(2) and (4)(1935).

The House opposed the Senate's strict version of Section 11(b)(1). It therefore amended S. 2796 to permit a holding company to control any number of integrated public-utility systems which the Commission might find could be included in such holding company system "consistently with the public interest."[30]

The House version of S. 2796 contained, for the first time, a definition of an integrated public-utility system which, as ultimately interpreted,[31] limited such a system to either electric or gas business. However, under the House version, the Commission would have been required to permit a holding company to control as many integrated gas and electric systems as the Commission might find could be retained "consistently with the public interest."[32]

As neither the House nor the Senate would accept the other's version of S. 2796, a joint conference committee was appointed and in due course a compromise was reached. In the compromise the Senate withdrew its objection to the House version of S. 2796 subject to inclusion of an amendment deleting the general test of public interest for the retention of more than one system and substituting the more specific geographic, size and economic standards set forth in the ABC tests of Section 11(b)(1). As so amended, Section 11(b)(1) would require the Commission to permit a registered holding company to retain one or more additional systems together with the principal system if these standards were met. The Section made no distinction between gas and electric properties.[33]

[30] S. 2796 § 11(b), as passed by the House of Representatives and sent to the Senate July 9, 1935.

[31] See American Water Works & Elec. Co., 2 S.E.C. 972, 983 (1937) (single system can include both gas and electric properties); Columbia Gas & Elec. Corp., 8 S.E.C. 443, 462-63 (1941), and United Gas Improvement Co., 9 S.E.C. 52, 77-83 (1941) (single system cannot include both gas and electric properties).

[32] S. 2796 §§ 2(a)(27), 11(b), as passed by House and sent to Senate July 9, 1935. See United Gas Improvement Co., *supra* at 80-81 (1941).

[33] See United Gas Improvement Co., *supra*.

The ABC tests were introduced in light of the concern expressed by Senator Wheeler and others over what was considered to be an overly broad delegation of congressional power in the House version.[34] The Managers on the part of the House reported:

"It may be observed that section 11(b) in both the Senate bill and the House amendment contemplates the reestablishment of the advantages of localized management in the operating utility industry and the consequently necessary breakdown of the control of large holding companies over geographically scattered operating utility companies. Section 11 of both bills, therefore, authorizes the Securities and Exchange Commission to require a holding company to limit its control over operating utility companies to one integrated public-utility system.

"To this limitation the Senate bill, like the House bill, allows in section 3 exceptions in the case of a holding company whose interests are essentially intrastate and in the case of a holding company whose interests are essentially foreign. The House amendment grants what amounts to a further exception when the Commission finds that more than one integrated system may be included in a holding-company system 'consistently with the public interest'.

"The conference substitute meets the House desire to provide for further flexibility by the statement of additional definite and concrete circumstances under which exception should be made to the form of one integrated system. Definite exceptions not only provide a satisfactory constitutional standard but also an effective standard for the guidance of both the Securities and Exchange Commission and those holding companies which wish voluntarily to comply with Congressional policy.

"The substitute, therefore, makes provision to meet the situation where a holding company can show a

[34] See 79 Cong. Rec. 10842 (1935) (remarks of Senator Wheeler); H.R. Rep. No. 1318, 74th Cong., 1st Sess. 45 (1935) (additional views of Representative Eicher); 79 Cong. Rec. 10838 (1935), (letter of Joseph P. Kennedy, then Chairman of the Commission).

real economic need on the part of additional integrated systems for permitting the holding company to keep these additional systems under localized management with a principal integrated system. Under such circumstances the Commission is directed to permit the holding company to retain control of such additional systems, even though not physically integrated with the principal system, provided all such integrated systems are located in the same State or States, or in adjoining States or a contiguous foreign country."[35]

The Petitioner argues in effect that the Managers' reference to a "real economic need" means a need so overwhelming that without the economies of combination the additional system would be incapable of economic operation. This, of course, stretches the Managers' actual words (and the words of the Act to which they were referring) far beyond their normal meaning. It wholly disregards the context in which the Managers spoke, that is, the stated objectives of the Act and the broad economic reform which the President and the Congress contemplated. Given that context, it is inconceivable that the Managers could have meant to imply what the Petitioner now urges. The Managers were clearly persuaded that the desire of the House for flexibility was met and that a meaningful standard satisfactory to the Senate and the House had been included. The Petitioner's argument gives no effect to these considerations. In fact the construction urged by the Petitioner would in the case of combined gas and electric operation produce even less flexibility than the original Senate version.

The Petitioner relies heavily on a comment made later by Senator Wheeler, who was one of the Senate conferees and Chairman of the Senate Committee on Interstate Com-

[35] H.R. Rep. No. 1903, 74th Cong., 1st Sess. 70, 71 (1935). Parts of this language are quoted in the Petitioner's brief. Words and sentences, however, are omitted with a resulting distortion of the emphasis and meaning intended by the Managers (Br. 15-16).

merce (See Br. 16.) Senator Wheeler was by no means impartial. He had championed the Senate version of Section 11 and was dissatisfied with the compromise.[36] The statement cited by the Petitioner was made by the Senator *after* passage of the Act by both branches of Congress. It was as follows:

> "After considerable discussion the Senate conferees concluded that the furthest concession they could make would be to permit the Commission to allow a holding company to control more than one integrated system if the additional systems were in the same region as the principal system and were so small that they were incapable of independent economical operation. . . . " 79 Cong. Rec. 14479 (1935).

The Respondents submit that this statement, coming after enactment, was not part of the legislative history at all. The best reason for considering it as evidence of the legislative intent, its impact on the voting, is missing.[37] Moreover, this Court has "often cautioned against the danger, when interpreting a statute, of reliance upon the views of

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[36] See 79 Cong. Rec. 1525, 4902-04 (1935). As stated by Senator Norris before passage of the final bill but following receipt of the conference report:

> "I am firmly of the belief, however, that this is a conference report which the Senator [Wheeler] was induced to sign because he realized that he couldn't get any better. I am confident that he is not satisfied with it . . . ." 79 Cong. Rec. 14470 (1935).

Senator Wheeler spoke immediately after Senator Norris. He in no way refuted Senator Norris' judgment as to his own dissatisfaction with the conference report. He differed with Senator Norris' remarks only with respect to whether or not there could be an intermediate holding company in a holding company system. 79 Cong. Rec. 14470 (1935).

[37] See United States v. United Mine Workers, 330 U.S. 258, 279-80 (1947); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 477 (1921); cf. State Wholesale Grocers v. Great Atl. & Pac. Tea Co., 154 F. Supp. 471, 485 (N.D. Ill. 1957), *rev'd on other grounds*, 258 F.2d 831 (7th Cir. 1958), *cert. denied*, 358 U.S. 947 (1959).

its legislative opponents." *NLRB* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964). Coming after the voting and from an opponent of the compromise embodied in the Act, the statement is suspect.[38] It should be considered as no more than an attempt on the Senator's part to salvage what he could from the compromise version of Section 11(b)(1).[39]

In sum, it was not a primary aim of the Act to limit each holding company system to a single integrated system. That was just what the legislative compromise rejected. The purpose was economic reform—the elimination of the evils listed in Section 1(b) and, through Section 11(b)(1), as this Court has said, to require divestment of "geographically and economically unrelated properties" in order to rejuvenate local management and restore effective state regulation:

> "Congress expressed in §1(c) its determination 'to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems,' thus eliminating the evil complained of in § 1(b)(4) and ameliorating the conditions specified in the other subsections of § 1(b). It accordingly adopted

[38] Moreover, it is inaccurate, as it states the test of Clause (A) in terms of size, and further because it indicates that the *proviso* was permissive while in fact the *proviso* requires the Commission to permit retention if the tests are met. The Petitioner also emphasizes that the statement was made "before the bill was enrolled" (Br. 16). Since enrollment is a ministerial act involving the printing of the bill and its signature by the Clerk of the House and the Secretary of the Senate (see 61 Stat. 634-35 (1947), 1 U.S.C. §106 (1964)), the significance of the Petitioner's point seems obscure. It is perhaps more relevant to note that the Congressional Record after enactment makes it clear that the debate in the Senate had in fact moved on to completely different subjects unrelated to the Act well before Senator Wheeler's statement. See 79 Cong. Rec. 14473-79 (1935).

[39] See United States v. Calamaro, 354 U.S. 351, 357-58 n. 9 (1957); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 288 (1956).

§ 11(b)(1), whereby holding companies are compelled to integrate and coordinate their systems and to divest themselves of security holdings of geographically and economically unrelated properties. In this way Congress hoped to rejuvenate local utility management and to restore effective state regulation, both of which had been seriously impaired by the existence and practices of nation-wide holding company systems." *North American Co.* v. *SEC*, 327 U.S. 686, 704 (1946). See also *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 436 (1938).

2. Neither the Act Itself nor its Legislative History Supports the Petitioner's Assumption of a Federal Policy against Common Control of Gas and Electric Utilities.

(a) *The Act.* Nothing in the Act states or implies that Congress considered combined gas and electric utility operation an evil to be eliminated. To the contrary, all the indications are that the policy with respect to such a combination was intended to be left to the states to determine. Federal regulation was to extend only to the point necessary to assure that the state policy was not circumvented.[40] This the Commission recognized in its Findings and Opinion below when it said,

[40] Report of National Power Policy Committee, H.R. Doc. No. 137, 74th Cong., 1st Sess. 10 (1935); S. Rep. No. 621, 74th Cong., 1st Sess. 29-30, 59 (1935); H.R. Rep. No. 1318, 74th Cong., 1st Sess. 14-15 (1935); Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 5423, 74th Cong., 1st Sess. 291, 330, 344 (1935) (Analysis inserted by Chairman Rayburn); R. 1277, 1464 n. 10 and 1470-71 (the Commission's Findings and Opinion, and the opinion of the First Circuit, in this proceeding). Also see Northern States Power Co., 36 S.E.C. 1, 7, 8 (1954); Res. Ex. 57; R. 85, 1310 (listing the 25 largest combination gas and electric systems in the United States of which NEES is 15th in size). The concern of Congress basically was with "utility plants *scattered* over many States and totally unconnected in operation" (emphasis added)—not with distribution by one utility in any given community of both gas and electricity. Report of National Power Policy Committee, *supra*, 4; Hearings before Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess. 460-62 (1935).

"We do not take the view that the Act expresses a federal policy against combined gas and electric operations as such." R. 1277.[41]

The Petitioner now in effect attempts to minimize this statement and approaches the subject indirectly by taking excerpts out of context and placing them in juxtaposition so as to imply competition between gas and electricity as an objective of the Act or as presumptively desirable. For example, the Petitioner says that under the Act:

"Retention was permissible if it resulted in 'the integration and coordination of related operating properties' [citing Section 1(b)(4)] under a management single-mindedly devoted to the development of those related properties in 'free and independent competition' [citing Section 1(b)(2) of the Act and parts of the Petitioner's brief]." Br. 17.[42]

The first requirement cited by the Petitioner, the "integration and coordination of related operating properties", is taken completely out of context and relevant words are omitted. Section 1(b)(4) states that the public interest and the interests of investors and consumers are or may be adversely affected —

"(4) *when the growth and extension of holding companies bears no relation to economy of management and operation or* the integration and coordination of related operating properties;" (The words omitted by the Petitioner have been italicized.)

[41] Before the First Circuit, counsel for the Petitioner sought to minimize this statement. The First Circuit noted that, "Counsel's attempt to explain this away [referring to the Commission's statement quoted above] by saying that the Commission's phrase 'as such' meant simply that the Commission was disclaiming interest when the interstate holding company form was not employed, attributes to the Commission the banality that it was not claiming jurisdiction in those cases where obviously it does not have it. We believe the Commission was saying something more than this, and that counsel, in the brief, is merely seeking some new ground to support the Commission's result." R. 1471.

[42] Similar partial quotations out of context also occur at Br. 20.

The First Circuit was disturbed by the omission of precisely the same key words in quoting from Section 1(b)(4) (R. 1461-62). The omitted words, "economy of management and operation", clearly apply to the economic test under Clause (A), and the NEES System clearly meets that requirement.

The Petitioner's second requirement, "management single-mindedly devoted to the development of those related properties in 'free and independent competition' ", can be found nowhere in the Act. The words "free and independent competition" in Section 1(b)(2) cited by the Petitioner are used in a completely different context. In that Section Congress stated that the public interest and the interests of investors and consumers are or may be adversely affected—

> "(2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; when service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States;"

The Act includes, in Sections 12 and 13,[43] comprehensive provisions for the regulation of those non-competitive, less than arm's-length transactions from which evils could result and which were within the concern of Congress: transactions involving such matters as sales of securities and assets in the absence of competitive conditions, service, management, construction and other similar contracts and transactions which if made within a holding company system or with its affiliates might without justification restrain competition in those areas and increase

[43] 49 Stat. 823-27 (1935), 15 U.S.C. §§ 791, 79m (1964).

charges to operating companies, in turn increasing the basis for their rates to consumers and reducing the return to investors. It is with such matters that Section 1(b)(2) is concerned.[44]

The Report filed by Senator Wheeler which accompanied S. 2796 stated detailed findings of which the following relate to non-competitive conditions and so provide the basis for that section of the bill which is now Section 1(b)(2) of the Act:

> "(7) subsidiary public-utility companies are often subjected to excessive charges for services, construction work, equipment, and materials to the detriment of investors and consumers; (8) subsidiary public-utility companies often enter into transactions with affiliates in which the absence of arm's-length bargaining operates to the detriment of investors and consumers; (9) control of subsidiary public-utility companies throughout the United States has often been used to secure to holding companies, their affiliates, and subsidiary construction companies construction work for public-utility companies in restraint of free and independent competition in that field; (10) service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States and present problems of regulation which cannot be dealt with effectively by the States without the assistance of the Federal Government; (11) control of subsidiary public-utility companies materially affects the accounting practices and rate, dividend, and other policies of such companies,

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[44] The rules of the Commission adopted under the Act to implement the regulation of transactions of this kind include Rule 50 (requiring competitive bidding in securities underwritings), Rule 70 (b)(2) (forbidding issue of securities to certain financial institutions with which the issuer has an interlocking officer or director), Rules 43, 44 and 45 (implementing Sections 12(d), (f) and (g) of the Act calling for maintenance of competitive conditions with respect to sales of securities and utility assets and intrasystem transactions) and Rules 80-95 (regulating service, sales and construction contracts). 17 C.F.R. §§ 250.50, 250.70(b)(2), 250.43-45, 250.80-95 (1964).

thereby in many instances complicating and obstructing State regulation of such subsidiary companies; . . . .'"[45]

(b) *Legislative History of Section 8.* Section 8 of the Act, dealing with acquisitions, is highly relevant on the question of federal and state policy concerning common control of gas and electric utility services. In Section 8, Congress provided that where state law prohibits or requires approval of combined gas and electric operation, a holding company may not acquire gas and electric companies serving the same territory without express approval of the state commission. Sections 9 and 10 impose additional conditions on acquisitions, but Section 9(b)(1) specifically exempts an acquisition of utility assets by a public-utility company if approved by state authority. The Act thus indicates a broad federal deference to state policy with respect to combination of gas and electric operations and an intent to assure the effectiveness of that policy and not, as happened here, to override and disregard the expressed position of the state regulatory body based on state public policy and the particular local conditions.[46] Indeed,

[45] S. Rep. No. 621, 74th Cong., 1st Sess. 21-22 (1935). The Petitioner cites to the contrary a statement by Senator Couzens indicating his concern with competition between electric lighting and gas (Br. 35 n. 25). It seems significant (i) that this is the only such reference in the entire Senate hearing, (ii) that the Mr. Benton with whom Senator Couzens was arguing was the General Solicitor of the Natonal Association of Railroad and Utilities Commissioners and (iii) that Mr. Benton promptly proceeded to refute Senator Couzens' approach to this issue. Hearings Before the Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess. 746, 783 (1935).

[46] Notwithstanding the DPU's unequivocal position in favor of NEES' retention of its gas companies, the Petitioner seems to suggest that Massachusetts policy is not as stated by the DPU and for this purpose cites excerpts from the DPU decisions in *Cambridge Gas* and *Lynn Gas & Electric* (Br. 36 n. 25). The quotation from *Cambridge Gas* dates from 1930, and omits significant language which shows that the principal reason for refusing approval of the merger of the Cambridge Gas and the Cambridge Electric companies was to preserve for the City of Cam-

the Report of the House Committee on Interstate and Foreign Commerce which accompanied the House version of S. 2796 stated with respect to Section 8(b), which constitutes the entire Section 8 in the Act as passed:

> "Subsection (b) prevents any company in a system from taking any step which would result in the [sic] bringing into the same holding company system a gas-utility company or an electric-utility company serving substantially the same territory as that served by any utility company in the system, where State law prevents the combination of the gas utility and electric utility in the same company. This subsection is concerned with competition in the field of distribution of gas and electric energy—a field which is essentially a question of State policy, but becomes the proper subject of Federal action where the extra-State device of a holding company is used to circumvent State policy."[47]

In the early versions of the Act, Section 8 made it unlawful after January 1, 1937 for a registered holding company, without state approval, to have an interest in an electric company and a gas company serving substantially the same territory, if the applicable state law prevented or required authorization of the ownership or operation of the gas and electric properties by a single company.[48]

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bridge the right to take over either the gas or electric business without the other. Cambridge Gas Light Co., P.U.R. 1930D 263, 265 (Mass. DPU 1930). Presumably, merger of the two Cambridge companies has not been sought again since they enjoy the economies of joint operation under the common control of New England Gas & Electric Association which is now exempt from the Act because its operation has been brought entirely within Massachusetts. The quotation from *Lynn Gas & Electric* does not reflect the result in that case and the evidence in this case (R. 71-73, 110, 144); namely that the transaction there approved by the DPU was a rearrangement continuing the two businesses *under the same NEES ownership*—the very arrangement which the Petitioner in this case has attempted to break up. Lynn Gas & Elec. Co., 31 P.U.R. 3d 209 (Mass. DPU 1959).

[47] H.R. Rep. No. 1318, 74th Cong., 1st Sess. 14 (1935).

[48] S. 1725 § 8(d) (1935) and H.R. 5423 § 7(d) (1935).

This provision was removed from Section 8 by the Senate Committee on Interstate Commerce with the idea that a forced break-up of such combinations should be effected under the orderly procedures of Section 11 rather than by an inflexible, flat prohibition within a fixed time under Section 8.[49] In considering the implications of Section 8 and its history generally, and this change in particular, it is vitally important to keep in mind that Section 8 in all stages of its development related solely to prevention of the use of interstate holding company systems to circumvent state policy, that is, to accomplish indirectly what state law prevents being done directly. The Petitioner's discussion of the topic and use of quotations relating to it (Br. 35-36) seem to overlook this important fact completely.

The Senate Report, which was filed with S. 2796 by Senator Wheeler and which had his entire support, included the same comment as the House report:

> "This subsection [in substance the present Section 8] is concerned with competition in the field of distribution of gas and electric energy — a field which is essentially a question of State policy, but becomes the proper subject of Federal action where the extra-State device of a holding company is used to circumvent State policy." S. Rep. No. 621, 74th Cong., 1st Sess. 29-30 (1935).

3. Permitting "Meaningful Consideration of the Competitive Advantages" of Separate Operation of the Gas Companies is not a Reason for Favoring the Petitioner's Test.

(a) *The Competition Factor.* The Petitioner explains that its test under Clause (A) really turns "on something more than mere size [of the economies to be lost] measured in dollars *or percentages*" (Br. 34, emphasis added), and

[49] S. 2796, introduced May 9, 1935 by Chairman Wheeler of the Senate Committee on Interstate Commerce, § 8(d). See S. Rep. No. 621, 74th Cong., 1st Sess. 4, 7-8 (1935).

that the requirement of "something more" enables the Commission, where a combination of gas and electric utilities is being examined, to take into account the competitive advantages of eliminating common control, without being required to state even approximately what weight it attributes to them or by what standard it measures them. The argument proceeds on the basis of their being "very real, although immeasurable, substantial competitive advantages" (Br. 38). It is another expression of the Petitioner's false assumption that the Act embodies a federal policy against combined gas and electric operations, discussed at pp. 33-39 above.

Respondents and the court below do not quarrel with the Petitioner's point that the competitive factor is relevant and should be considered in testing the substantiality of the economies to be lost upon severance. This obviously is a part of the business judgment which the court below called for (R. 1464, 1469-70), but the total competitive situation, not merely the competition between gas and electricity, must be examined. It was for this reason that the Respondents introduced extensive evidence concerning the total competitive situation of the NEES gas companies, with respect to both the competition between gas and electricity and, in Massachusetts, the far more significant competition between gas and fuel oil.

As to the competition between gas and electricity, the evidence, which was uncontroverted, showed that the operation of the gas companies as a part of the NEES System under the supervision of the separate Gas Division provides aggressive promotion and high standards of service under competent management devoted exclusively to the gas business, in no way suppressing or hampering competition between gas and electricity or favoring either to the detriment of the other.[50] The chairman of the DPU testi-

[50] R. 66-67, 71-74, 138-39, 170-82, 191-98, 206-09, 220-30, 307-15, 393-401, 501-02, 506-07, 511-12, 517-18.

fied to the same effect (R. 589, 594). As to the competition between gas and fuel oil, the evidence showed severe competition for the space heating market, which is the principal market for gas (R. 232, 715), and in view of that competition, the particularly adverse impact that rate increases resulting from the loss of economies would have upon the overall competitive position of the gas companies (R. 221-22, 227-28, 232-39, 721-23). The Chairman of the Massachusetts DPU was quite explicit on these points. He testified to the serious concern of his Department over the loss of what he considered very substantial economies and resulting increases in rates to consumers which, in his judgment, would have an adverse impact upon the gas companies' ability to compete with oil (R. 589, 590-92).

The Petitioner nonetheless discusses in broad and generalized terms the problems that have arisen in prior divestment cases involving gas and electric companies, and notes that various potential abuses can result from combined operation (Br. 34-38). However, in this case, the evidence showed that no such abuses have resulted, and that for years NEES has taken effective measures through separate management to prevent their occurring[51]; and thus the Petitioner can do no more than note that the "Commission recognized that joint control by NEES . . . *could well* lead to the favoring of one kind of service to the disadvantage of users of the other." (Br. 37. Emphasis added.)

The Petitioner's position seems to be that if independent operation is possible, the Commission should be free to conclude that the gas companies and their customers should bear the burden of the loss of proven significant economies, in order to protect them against what are no more than potential future abuses, and that the test under Clause (A) should be such as to permit that result. Divestiture would be ordered now on no firmer ground than the hope that

[51] See n. 50 above.

competitive advantages, which are necessarily purely speculative, will be sufficient to overcome not only the loss of proven economies, but also, in this case, significant disadvantages in the primary competition of gas with oil. There is no need for such a decision now as the Commission will have continuing jurisdiction to correct abuses should they arise in the future.

If the Petitioner's rationale is accepted, the Commission will have a "carte blanche." The burden of proof can never be met. Even if, as was the case here, the only evidence in the record shows that there will be a significant loss of economies, and, in addition, shows not only that no benefits will result from separation but further that significant competitive disadvantages will result, the Commission nonetheless will be free to assume the contrary and give unlimited weight to this factor without any standard of measurement. The First Circuit did not question the Commission's right to consider competitive advantages, but it did indicate that at least a finding of approximate financial benefit should be made, particularly "where the evidence shows that NEES has made a special effort to obtain for its gas system many of the benefits of independence." R. 1470. This certainly is the minimum that a reviewing court can require in order to assure that the administrative action is not arbitrary. If Petitioner is right, judicial review as a practical matter will be meaningless, and the Commission will have at least as much latitude as it would have had under the House version of S. 2796, which the then Chairman of the Commission described as too broad a delegation of power.[52]

(b) *Choice of tests.* The justification for the test urged by the Petitioner would be relevant only in cases involving combinations of gas and electric systems. It is meaningless when an additional gas system is sought to be retained with a principal gas system, or an additional elec-

[52] Letter of Joseph P. Kennedy, 79 Cong. Rec. 10838 (1935).

tric system is sought to be retained with a principal electric system. It is false reasoning to justify a test based on administrative convenience when that justification is relevant in only some cases, but not in all. The ABC tests do not make the distinction between different kinds of utility operation which the Petitioner's argument would require.

It is also false reasoning to favor a test because it fits particular factors to which the Commission wishes to give effect instead of determining the test intended by Congress and then giving effect to such factors as are relevant to that test.

Finally, the Petitioner's brief leaves unanswered the obvious question of how competitive advantages or disadvantages of independence can be more easily or effectively given "meaningful consideration" under the Commission's test than under the court's test. Just the reverse would appear to be true. It would seem easier to give consideration to this somewhat speculative factor, which the Petitioner says is "immeasurable", as one of the general circumstances in determining the substantiality of economies (a relative matter in any case) than in making an absolute yes-or-no determination of the ability of the system to continue economic operation.

III. The Record of Administrative Interpretation of Clause (A) by the Commission is not such as to Warrant "Great Deference" from the Court.

The Petitioner asserts that the standard which it now urges for Clause (A) is a long standing judicially approved administrative test which has been consistently applied by the Commission and which is entitled to great deference from this Court (Br. 10, 26-27).[53]

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[53] Notwithstanding the Petitioner's suggestion that the Court should defer to the Commission's interpretation of Clause (A), the question whether an administrative agency's interpretation of a statute is correct is ultimately for the Court to determine. NLRB

In its Petition for a Writ of Certiorari the Petitioner told the Court that in this case it had applied under Clause (A) the same test as "it had applied in every other divestiture case under Section 11(b)(1)" (Pet. 5), and that under that test "more than $2,000,000,000 in utility assets have heretofore been divested on orders of the Commission" (Pet. 12).

The contention is now somewhat equivocated. In its brief the Petitioner suggests that in the earlier cases the test applied by the Commission really was "essentially the same" (Br. 27), that the Commission has "reemphasized the same themes" as were reflected in an earlier decision (Br. 28-29), and that the seemingly different tests stated by the Commission are nothing more than a "variation in choice of words, due for the most part to the varying contentions with which the Commission was dealing" (Br. 30).

Even in the course of this case, the Petitioner has stated a bewildering variety of different versions of its test with the result that it is very difficult to know just what that test is and, as the court below noted, to determine whether there is a difference between the Commission's test and a test of ultimate bankruptcy, and if there is a difference, the standard by which unsound and uneconomical operation is to be determined. (See R. 1458 n. 5). The tests stated by the Commission in its Findings and Opinion range from the test based "solely upon whether the increased operating costs occasioned by severance are 'substantial'" (R. 1273), apparently looking solely to the change in operating costs, to the other extreme that additional systems could be retained only if they were " 'so small that they were incapable of independent economic operation.' " (R. 1261).

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v. Hearst Publications, Inc., 322 U.S. 111, 130-31 (1944). In the final analysis the phrase "substantial economies" sets forth a legal standard and it must get its final meaning from judicial construction. *Cf.* FTC v. Colgate Palmolive Co., 380 U.S. 374, 385 (1965).

Other tests stated in the instant case include:

(i) There must be " 'real economic need' for management together. . . ." R. 1261;

(ii) The economies must have been "substantial in the sense that they were important to the ability of the additional system to operate soundly." R. 1261-62;

(iii) The loss of economies must be "so important as to cause a serious impairment" of the additional system. R. 1263;

(iv) " 'The loss of substantial economies' must be such as to render the additional system incapable of sound and economical operation independent of the principal system." Pet. 2;

(v) " 'such additional system cannot be operated under separate ownership without the loss of economies so important as to cause a serious impairment.' " Pet. 5;

(vi) "a holding company may not retain an additional . . . system unless it can show that such system is incapable of independent economical operation." Pet. 12; and

(vii) "a loss is not 'substantial' unless it would render impossible 'economical or efficient operation' " R.1458.[54]

1. The Prior Administrative Decisions under Clause (A) are Seriously Inconsistent and Confusing.

The earlier decisions of the Commission tend to show a "variation in choice of words", as the Petitioner now puts it (Br. 30), similar to that in the instant case. Analysis

[54] The court below criticised the Commission for its use of the word "efficient" which is taken from Section 1(b)(5) where it is used in connection with service and does not relate to the test of economy (R. 1463). The Petitioner in no way refutes or questions this analysis but instead now presents a different test which is not concerned with efficiency of service but is based on the concept of "soundness", presumably meaning financial soundness. In its 31st Annual Report, for the year 1965, the Commission reported to Con-

of these prior decisions leads to the conclusion that the test urged by the Petitioner in its brief is not of long standing and has not been consistently applied.

Of the more than $2,000,000,000 of assets which the Petitioner claims have been divested under the test which it now urges, approximately $1,062,800,000 of assets, or more than half, directly contradict the Petitioner's argument.[55] The interpretation applied in the divestiture of these assets was the one set forth by the Commission in *North American*, and followed by the Commission in several later cases: that the words should be given their normal and usual meaning connoting economies which would be important or significant in light of the circumstances:

> "The normal and usual meaning of the word 'substantial' is a meaning connoting 'important'. And we think that this normal and usual meaning is compelled here. The degree of importance must be measured against the vital policy to which Clause (A) is an exception, *i.e.*, the policy of limiting holding companies to the operation of a single integrated public utility system."[56]

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gress that the test it had applied in this case was whether the additional system would be "incapable of independent economic operation". Securities and Exchange Commission, *31st Annual Report* 86 (1965).

[55] See Item 1 in Appendix B to this brief.

[56] North American Co., 11 S.E.C. 194, 209 (1942). On review, the Second Circuit approved the interpretation of "substantial" economies as meaning "important" economies, not merely something more than nominal, but said nothing as to the Commission's further reference to a policy of limiting holding companies to one system. North American Co. v. SEC, 133 F.2d 148, 152 (2d Cir. 1943), *aff'd on constitutional issues*, 327 U.S. 686 (1946). In its Brief the Petitioner omits entirely the test of substantiality formulated by the Commission in *North American*, and instead says that in the case (i) the Commission quoted "with approval" the remarks made by Senator Wheeler after passage of the Act (it did not); and (ii) the Commission "significantly stressed the importance of independent management, single-mindedly devoted to the operation of integrated properties and to the interests of the stockholders therein" (again, it did not). See Br. 28; 11 S.E.C. at 209, 211.

In *Engineers*,[57] involving another divestiture of approximately $23,600,000 of assets, the Commission stated an intermediate test—loss which "would seriously impair the effective operations of the systems involved"—something more serious apparently than merely important, but not necessarily serious enough to destroy, only seriously impair, the capacity for effective operations. However, the actual decision rested on inadequacy of proof.

Additional divestitures of approximately $750,100,000 of assets are irrelevant for the reason that the evidence in the cases was insufficient under any standard and the Commission disposed of all of them without stating any interpretation of Clause (A).[58]

There remain three cases[59] involving divestiture of approximately $146,400,000 of assets, or less than 7½% of the $2,000,000,000 claimed by the Petitioner. In these three cases only has the Commission stated as its test under Clause (A) a standard similar to, not always identical with, its present test but in none of them does it appear that the test was the determining factor which led to the divestiture order. In *Philadelphia*, the Commission's opinion on the Section 11(b)(1) question was devoted principally to a criticism of the evidence and of the qualifications of the expert witness who testified on behalf of the respondent. The Commission rejected the evidence of the economies to be lost in its entirety. In the second case,

[57] Engineers Pub. Serv. Co., 12 S.E.C. 41, 57-65, 79-81, 86-88 (1942). In its description of this case in its brief (Br. 29-30) the Petitioner again fails to report the test of substantiality formulated by the Commission in *Engineers*. Instead Petitioner furnishes extensive quotations on the evidentiary issues which, although the principal issues in *Engineers*, are not in issue here: namely, whether evidence of "increased *expenses*" without more could show "loss of *economies*", and the conclusion that "clear and convincing evidence" should be required. Br. 29-30; 12 S.E.C. at 57-58, 60-61. See Item 2 in Appendix B to this brief.

[58] See Item 3 in Appendix B to this brief.

[59] See Item 4 in Appendix B to this brief.

General Public Utilities, the Respondent did not contest divestiture, and in the third case, *Middle South Utilities*, the Respondent had submitted no study of any kind to show the economies to be lost by the additional system upon severance.

The Petitioner states in its brief that the Respondents "concede" that in the period since *Philadelphia* "the Commission has articulated no different test from the one it applied here" (Br. 27). That is somewhat misleading. More accurately stated, the Respondents' position is that only in *Philadelphia* and two cases since *Philadelphia*, being three out of the total of thirteen cases cited by the Petitioner, has a test like the present test even been "articulated" by the Commission (in the two other cases since *Philadelphia* no test was stated[60]); that these three cases involved less than 7½% of the assets claimed by the Petitioner to have been divested under the test which it now advocates; and that even in these three cases the test was not determinative.

In brief, the Respondents say that the test is not long standing and that by no means has it been consistently applied.

2. The Weight of Judicial Decisions is Against the Petitioner's Position.

The test now urged by the Petitioner has been placed squarely in issue in two Courts of Appeals — in the First Circuit in this case and in the Fifth Circuit in the *Louisiana* case.[61] Both times the test has been rejected by a unanimous court.

[60] See Item 3 in Appendix B to this brief.

[61] Louisiana Pub. Serv. Comm'n v. SEC, 235 F.2d 167, 173 (5th Cir. 1956), *rev'd on jurisdictional grounds*, 353 U.S. 368 (1957). The Petitioner suggests that *Louisiana* has "no legal consequence" (Br. 33-34 n. 23) because this Court later reversed on jurisdictional grounds. So far as the parties to the case itself were concerned, that contention may have some meaning. However, the importance of the case as a definite and unanimous statement of the view of the Fifth Circuit is unimpaired, as clearly the Fifth Circuit thought that it did have jurisdiction and was in fact deciding the issue.

Three earlier Circuit Court cases also involved Clause (A) but they give the Petitioner's present position little, if any, support.

In *North American*[62], the first case, the Second Circuit approved the Commission's interpretation in *North American* noted above: that "substantial" economies means "important" economies and not merely something more than nominal. The court naturally made no reference to the Commission's present interpretation, as it had not then been formulated.

In the second case, *Engineers*,[63] the District of Columbia Court of Appeals adopted the Second Circuit's interpretation in *North American*, but enunciated it at greater length. The majority of the court concluded there were three factors to be considered in determining "substantial economies", namely, that there be "a continuing substantial strength, enjoyed by the controlled company which it would not have under its own control", that there was "no reasonable expectation that a compensating strength would not be enjoyed by reason of its own control", and that the continuing strength of the controlled company "would not entail a sacrifice on the part of the controlling utility."[64] However, the decisive issue in *Engineers* was not the meaning of "substantial" but

[62] North American Co. v. SEC, 133 F.2d 148, 152 (2d Cir. 1943), *aff'd on constitutional issues*, 327 U.S. 686 (1946). The Petitioner has failed to cite or discuss the Second Circuit's decision in its brief.

[63] Engineers Pub. Serv. Co. v. SEC, 138 F.2d 936, 944 (D.C. Cir. 1943), *cert. granted*, 322 U.S. 723 (1944), *dismissed as moot*, 332 U.S. 788 (1947).

[64] These three factors comprise a test of Clause (A) far less harsh than that advocated by the Petitioner in this case. The loss of a "continuing substantial strength" would be less than the loss of the capability of sound and economical operation (see above at pp. 44-45); "no reasonable expectation" is far different from an unsubstantiated presumption of offsetting benefits (R. 1470); and "sacrifice on the part of the controlling company" is recognition of an adverse effect on the principal system, which the Commission in the instant case considers irrelevant (R. 1264 n. 14).

whether the net effect of divestment could be established by evidence of operational savings through combined operations, without more. On this question the court divided, with the majority approving the Commission's requirement of "a clear and convincing showing that the operational savings through combination would be sufficient to support a finding that such single item of saving would constitute an overall substantial economy." Deciding the case on the inadequacy of the evidence, the majority did not reach the Commission's interpretation of "substantial" as used in Clause (A).[65]

In the third case, *Philadelphia*[66], the District of Columbia Court of Appeals held that the Commission had not acted unreasonably in rejecting the utility's estimate of increased operating expenses as insufficiently established. The court added, moreover, that as was stated in *Engineers*, the mere showing of a material saving in operational expenses does not necessarily show the overall situation. The court agreed that the Commission could find support for its interpretation of "substantial economies" in parts of the legislative history. However, the court did not hold that the Commission's interpretation of "substantial" was correct; for the purposes of the decision that was not necessary. The court concluded:

> "'Substantial' is a relative and elastic term. Petitioners concede that economies, to be substantial, must be 'important.' We cannot say the Commission's under-

[65] The dissent by Judge Soper suggested that substantial savings in operational expenses can be substantial economies, and so in his dissent (unlike the majority opinion) the standard applied by the Commission had to be considered. Judge Soper's view was that the Commission was "putting it too strongly" to say "that there must be clear and convincing evidence of loss of economies which would seriously impair the efficiency of the systems." 138 F.2d at 945.

This Court granted a writ of certiorari in *Engineers*, and argument was heard, but the case was subsequently ordered vacated as moot. See n. 63 above.

[66] Philadelphia Co. v. SEC, 177 F.2d 720, 724 (D.C. Cir. 1949).

standing of the term 'substantial economies' is wrong. We construed it similarly in the Engineers case." 177 F.2d at 725.

In sum, the Commission's present test has been placed squarely in issue twice, before the court below and in *Louisiana*. Both times it has been rejected. The earlier cases, *North American* and *Engineers*, involved a far less severe test, and in *Engineers* the actual decision pertained only to the evidentiary issue. *Philadelphia's* support for the Petitioner's test is weak: it is *dictum*, and the court itself thought it was going no further than it had in *Engineers*.[67]

CONCLUSION

For the reasons stated, the decision of the court below should be affirmed.

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March 9, 1966

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[67] The Respondents' reading of the *Engineers* and *Philadelphia* decisions is essentially the same as the Fifth Circuit's in *Louisiana*. See 235 F. 2d at 173.

APPENDIX A

Statute Involved

Sections 1(b) and (c), 2(a)(29), 8 and 11(b)(1) (A)-(C) of the Public Utility Holding Company Act of 1935*

Section 1....

(b) Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to H. Res. 59 (Seventy-second Congress, first session) and H. J. Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is hereby declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected—

(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts; when such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utility companies; when such securities are issued by a subsidiary public-utility company under circumstances which subject such company to the burden of supporting an overcapitalized structure and tend to prevent voluntary rate reductions;

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*49 Stat. 803-04, 810, 817, 820 (1935), 15 U.S.C. §§ 79a(b) and (c), 79b(a)(29), 79h, 79k(b)(1) (1964).

(2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; when service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States;

(3) when control of subsidiary public-utility companies affects the accounting practices and rate, dividend, and other policies of such companies so as to complicate and obstruct State regulation of such companies, or when control of such companies is exerted through disproportionately small investment;

(4) when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties; or

(5) when in any other respect there is lack of economy of management and operation of public-utility companies or lack of efficiency and adequacy of service rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital.

(c) When abuses of the character above enumerated become persistent and widespread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of

properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title.

SECTION 2. (a) When used in this title, unless the context otherwise requires—

. . .

(29) "Integrated public-utility system" means—

(A) As applied to electric utility companies, a system consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility assets, whether owned by one or more electric utility companies, are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation; and

(B) As applied to gas utility companies, a system consisting of one or more gas utility companies which are so located and related that substantial economies may be effectuated by being operated as a single coordinated system confined in its operation to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation: *Provided,* That gas utility companies deriving natural gas from a common source of supply may be deemed to be included in a single area or region.

SECTION 8. Whenever a State law prohibits, or requires approval or authorization of, the ownership or operation by a single company of the utility assets of an electric utility company and a gas utility company serving substantially the same territory, it shall be unlawful for a registered holding company, or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, —

(1) to take any step, without the express approval of the State commission of such State, which results in its having a direct or indirect interest in an electric utility company and a gas utility company serving substantially the same territory; or

(2) if it already has any such interest, to acquire, without the express approval of the State commission, any direct or indirect interest in an electric utility company or gas utility company serving substantially the same territory as that served by such companies in which it already has an interest.

SECTION 11. . . .

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of sub-

stantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

. . . .

APPENDIX B

Classification of Administrative Cases Listed In Appendix B To The Petition for a Writ of Certiorari[1]

	Assets Divested
1. Cases stating or following test set forth by the Commission in *North America* (11 S.E.C. 194 (1942)):	
North American Co., 11 S.E.C. 194, 209 (1942)	$ 659,158,089
Cities Serv. Power & Light Co., 14 S.E.C. 28, 37, 47-48 (1943)[2]	59,995,535
Middle West Corp., 15 S.E.C. 309, 319 (1944)	97,751,921
Cities Serv. Co., 15 S.E.C. 962, 984 (1944)	148,258,253
American Gas & Elec. Co., 21 S.E.C. 575, 596-97 (1945)	97,684,103
Sub total	$1,062,847,901
2. Proof inadequate but an intermediate test stated, namely, the loss "would seriously impair the effective operations of the systems involved" (12 S.E.C. at 61):	
Engineers Pub. Serv. Co., 12 S.E.C. 41, 57-65, 79-81, 86-88 (1942)	$ 23,571,236
3. Evidence insufficient under any standard and no interpretation of Clause (A) stated by Commission:	
North American Co. (St. Louis Properties), 18 S.E.C. 611, 613-15, 621 (1945)	$ 13,129,400
Peoples Light & Power Co., 20 S.E.C. 357, 380-81 (1945)	182,000
Commonwealth & Southern Corp., 26 S.E.C. 464, 487-90 (1947)[3]	722,259,916

	Assets Divested
Penn. Gas & Elec. Corp., 28 S.E.C. 553, 558 (1948)	$ 2,349,409
Eastern Util. Ass'tes, 31 S.E.C. 329, 348-52 (1950)	12,234,309
Sub total	$ 750,155,034
4. Test similar to Commission's present interpretation stated, but not determinative:	
Philadelphia Co., 28 S.E.C. 35, 46-47, 53-74 (1948)	$ 113,605,913
General Pub. Util. Corp., 32 S.E.C. 807, 814-15, 826-27, 831 (1951)	13,757,386
Middle South Util., Inc., 35 S.E.C. 1, 11-13 (1953)	19,061,622
Sub total	$ 146,424,921
Grand Total	$1,982,999,092

[1] Figures are taken from that Appendix as they cannot in most instances be verified from the cited cases.

[2] Includes one subsidiary (net assets of approximately $422,000 or only approximately 1% of the assets ordered divested in the case) as to which the Commission said that, although it was small, the record did not show the company was "incapable of economic, independent operation". This was viewed as "*one* of the guides which (*among others*) Congress intended to be used. . . ." 14 S.E.C. at 62. (Emphasis added.) Significantly, this language was not cited in support of the interpretation stated in *Philadelphia*. (See Item 4 above.)

[3] Includes one subsidiary (net assets of approximately $28,000,000 or only approximately 4% of the assets ordered divested in the case) which the utility had agreed to divest and which the Commission held not retainable under Clause (C) but as to which the Commission also quoted the language stated in note 2 above. 26 S.E.C. at 487, 489.

SUPREME COURT OF THE UNITED STATES

No. 636.—October Term, 1965.

Securities and Exchange Commission, Petitioner, v. New England Electric System et al.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[May 16, 1966.]

Mr. Justice Douglas delivered the opinion of the Court.

New England Electric System (NEES) is a holding company registered under § 5 of the Public Utility Holding Company Act of 1935.[1] Its holdings include both electric and gas utility properties. The electric companies serve retail customers in New Hampshire, Massachusetts, Rhode Island, and Connecticut. The gas companies serve retail customers in Massachusetts alone. The Commission, proceeding under § 11 of the Act,[2] held that the electric utility subsidiaries of NEES comprised an "integrated electric utility system" as defined in § 2 (a)(29)(A).[3] 38 S. E. C. 193. The question in this

[1] 49 Stat. 812, 15 U. S. C. § 79e (1964 ed.).

[2] 49 Stat. 820, 15 U. S. C. § 79k (1964 ed.).

[3] 49 Stat. 810, 15 U. S. C. § 79b (a)(29)(A) (1964 ed.). An "integrated public-utility system" as applied to *electric utility companies* is defined by § 2 (a)(29)(A) as "a system consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility assets, whether owned by one or more electric utility companies, are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation."

case does not concern these electric utility subsidiaries but only the gas utility subsidiaries of NEES, which both NEES and the Commission agree constitute an "integrated gas utility system" within the meaning of § 2 (a)(29)(B) of the Act.[4]

By § 11 (b)(1)[5] a holding company system is to be limited in operations by the Commission "to a single integrated public-utility system,"[6] provided however that it may be permitted to control one or more additional "integrated public-utility systems" if the Commission finds, *inter alia*, that "[e]ach of such additional systems cannot be operated as an independent system *without the loss of substantial economies* which can be secured by the retention of control by such holding company of such system." § 11 (b)(1)(A). (Italics supplied.) It is on the meaning of this proviso that the present controversy depends. The Commission found that divestment of NEES' gas utilities would not result in a "loss of substantial economies" to these companies within the meaning of § 11 (b)(1)(A). It construed Clause (A) to require a showing that the "additional

[4] 49 Stat. 810, 15 U. S. C. § 79b (a)(29)(B) (1964 ed.).

An "integrated public-utility system" as applied to *gas utility companies* is defined by § 2 (a)(29)(B) as "a system consisting of one or more gas utility companies which are so located and related that substantial economies may be effectuated by being operated as a single coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation."

[5] 49 Stat. 820, 15 U. S. C. § 79k (b)(1) (1964 ed.).

[6] The Commission has long held that a single "integrated public-utility system" cannot include both gas and electric properties. See *Columbia Gas & Electric Corp.*, 8 S. E. C. 443, 462–463; *The United Gas Improvement Co.*, 9 S. E. C. 52, 77–83; *Philadelphia Co.*, 28 S. E. C. 35, 44. Respondent does not contest this aspect of the Commission's reading of the Act.

system cannot be operated under separate ownership without the loss of economies so important as to cause a serious impairment of that system." The Commission ruled that it was unable "to find that the gas companies could not be soundly and economically operated independently of NEES." It found that any losses of economies would be offset by the benefits that would flow from the healthy competition between the independently controlled gas and electric companies, promotion of competition between gas utilities and electric utilities being an important purpose of the Act. Accordingly, it ordered that the gas utilities be divested.

On petition for review the Court of Appeals reversed on the ground that the Commission had misinterpreted the statutory phrase "loss of substantial economies." 346 F. 2d 399. The court held that Clause (A) "called for a business judgment of what would be a significant loss, not for a finding of total loss of economy and efficiency" (346 F. 2d, at 406), and, believing that on this record and with the statute so interpreted there could have been a finding in favor of NEES, remanded the case to the Commission. We granted certiorari, 382 U. S. 953.

We agree with the Commission's reading of Clause (A) and remand the cause to the Court of Appeals so that there may be a review of the challenged order in light of the proper meaning of the statutory term.

The requirement in § 11 of a "single integrated" system is the "very heart" of the Act.[7] The retention of an "additional" integrated system is decidedly the exception.[8] As originally passed by the Senate, § 11 would have limited all registered holding companies to a single "geographically and economically integrated public-

[7] *North American Co.* v. *SEC*, 327 U. S. 686, 704, n. 14; S. Rep. No. 621, 74th Cong., 1st Sess., 11.

[8] *North American Co.* v. *SEC*, *supra*, at 696–697.

utility system." [9] The House version differed in that it permitted the Commission to make exceptions where limitation of the operations of the holding company was not found to be "in the public interest." [10] The version with which we deal emerged from a conference committee. The scope of the exception as it appears in the bill's final form was thus explained to the House:

> "Section 11 of both bills [i. e. the House and Senate versions], therefore, authorizes the Securities and Exchange Commission to require a holding company to limit its control over operating utility companies to *one integrated public-utility system.*
>
> . . . . . .
>
> "The conference substitute meets the House desire to provide for further flexibility by the statement of additional definite and concrete circumstances under which exception should be made to the form of one integrated system. . . .
>
> "The substitute, therefore, makes provision to meet the situation where a holding company *can show a real economic need* on the part of the additional integrated systems for permitting the holding company to keep these additional systems . . . ." (H. R. Rep. No. 1903, 74th Cong., 1st Sess., 70–71, italics supplied.)

Additional light is shed on the purpose of § 11 by the remarks of Senator Wheeler, a member of the conference committee:

> "Since both bills accepted the proposition that a holding company should normally be limited to one

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[9] S. 2796, § 11 (b), 74th Cong., 1st Sess. And see S. Rep. No. 621, 74th Cong., 1st Sess., 32.

[10] S. 2796, § 11 (b), as passed by the House of Representatives, and sent to the Senate on July 9, 1935. And see H. R. Rep. No. 1318, 74th Cong., 1st Sess., 17.

> integrated system, my colleagues and I conceived it to be our task to find what concrete exceptions, if any, could be made to this rule that would satisfy the demand of the House for some greater flexibility. After considerable discussion the Senate conferees concluded that the furthest concession they could make would be to permit the Commission to allow a holding company to control more than one integrated system if [among other tests] the additional systems were in the same region as the principal system and were so small that they were *incapable of independent economical operation* . . . ." 79 Cong. Rec. 14479.

As the Commission said in 1948:

> "The legislative history of Section 11 (b)(1) indicates that it was the intent of Congress to create only a limited exception to the general rule confining holding companies to a single system, and that this exception was created to deal with the situation in which the proven inability of the additional system to stand by itself would result in substantial hardship to investors and consumers were its relationship with the holding company terminated." *Philadelphia Co.*, 28 S. E. C. 35, 46.

While the Commission has variously phrased the rule, it has consistently adhered to that view.[11]

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[11] Respondent concedes that the Commission has, since 1948, "articulated" a test "like the present test." See *Philadelphia Co.*, 28 S. E. C. 35, 46–47, 53–74; *General Public Utilities Corp.*, 32 S. E. C. 807, 814–815, 826–827, 831; *Middle South Utilities Inc.*, 35 S. E. C. 1, 11–13. Respondent contends, however, that previous decisions of the Commission applied a less restrictive standard of "substantial economies." The Commission disagrees, urging that while there was "some variation in choice of words," it has maintained a basically consistent position and that any semantic differences are due largely to "the varying contentions with which the

This suggests a much more stringent test than "a business judgment of what would be a significant loss," to quote the Court of Appeals. 346 F. 2d, at 406. Promotion of "economy in management and operation" and "the integration and coordination of *related* operating properties" (§ 1 (b)(4), 49 Stat. 804, 15 U. S. C. § 79a (b)(4), emphasis added) is a theme that runs throughout the Act. But so does the theme of eliminating of "restraint of free and independent competition." [12] § 1 (b)

Commission was dealing." The cases referred to are *North American Co.*, 11 S. E. C. 194, 208–213; *Engineers Public Service Co.*, 12 S. E. C. 41; *Cities Service Power & Light Co.*, 14 S. E. C. 28, 37; *Middle West Corp.*, 15 S. E. C. 309, 319; *Cities Service Co.*, 15 S. E. C. 962, 984; *American Gas & Electric Co.*, 21 S. E. C. 575, 596–597. We do not read those cases as being inconsistent with the Commission's position since 1948. In each of these cases the Commission found no showing of "substantial economies" under whatever test might be applied; thus it was not there compelled to go further. There are, to be sure, a few cases in which the Commission permitted retention of small additional systems on the ground that the requirements of § 11 (b)(1) were met; in these, however, the Commission did not articulate any standard. See, *e. g.*, *Federal Light & Traction Co.*, 15 S. E. C. 675, 683; *Republic Service Corp.*, 23 S. E. C. 436, 451. But cf. *The North American Co.*, 11 S. E. C. 194, 243–244.

We cannot say that these early decisions show any clear inconsistency with the standard which the Commission today applies, and has applied since 1948. Under these circumstances, we feel justified in regarding the Commission's reading of the statute as supported by consistent administrative practice.

[12] Section 1 (b)(2) provides ". . . [I]t is hereby declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected . . . (2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining *or from restraint of free and independent competition;* . . ." (Italics added.)

(2), 49 Stat. 803–804, 115 U. S. C. § 79a (b)(2). One of the evils that had resulted from control of utilities by holding companies was the retention in one system of both gas and electric properties and the favoring of one of these competing forms of energy over the other.[13]

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[13] See S. Rep. No. 621, 74th Cong., 1st Sess., 29; Report of National Planning Committee, H. R. Doc. No. 137, 74th Cong., 1st Sess., 10 (Appendix to S. Rep. No. 621, 74th Cong., 1st Sess.).

Congress was well aware of the anti-competitive potential of corporate structures through which control of gas and electric utility companies rests under the umbrella of a single holding company. That a holding company so situated might retard expansion of the gas utility company in favor of the electric utility company was expressly discussed on the Senate Hearings on an earlier version of the Act. See Hearings before the Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess., 783.

Congress made specific provision in § 8 of the Act to prohibit a registered holding company from acquiring an interest in both an electric and a gas utility serving the same territory in a State which prohibits common control, without first obtaining permission from the appropriate state regulatory agency. While § 8 reflects the concern of Congress with this aspect of competition (see S. Rep. No. 621, *supra*, at 29–30; Report of National Power Policy Committee, *supra*, at 10), there is no warrant for concluding that § 8 was the exclusive legislative effort relating to the problem. The history of the Act reflects the presence of a sophisticated statutory scheme. To some extent, local policy was expected to govern, with § 8 serving to prevent circumvention of that policy by use of the "extra-State device of a holding company." S. Rep. No. 621, *supra*, at 29–30. At the same time, § 11 was expected to assist in imposing restrictions with regard to the combination of gas and electricity in one system. Discussing the interplay between § 8 and § 11, the Senate Committee noted that § 8 only applied to future acquisitions: "The committee felt that while the *policy upon which this section was based was essential in the formation of any Federal legislation* on utility holding companies, it did not think that the section should make it unlawful to retain (*up to the time that section 11 may require divestment*) interests in businesses in which the companies were lawfully engaged on the date of the enactment of the title." *Id.*, at 7. (Italics supplied.)

In the present case the Commission said on this phase of the controversy:

> "Although the NEES Gas Division handles sales and promotional activities and various other matters for the gas subsidiaries separately from the electric companies, final authority on all important matters rests in the top NEES management. The basic competitive position that exists between gas and electric utility service within the same locality is affected by such vital management decisions as the amount of funds to be raised for or allocated to the expansion or promotion of each type of service." [14]

Competitive advantages to be gained by a separation are difficult to forecast. The gains to competition might well be in the public interest and might well offset the estimated loss in economies of operation [15] resulting from a separation of the gas from the utility system. This is a matter for Commission *expertise* on the total competitive situation, not merely on a prediction whether, for example, a gas company in a holding company system may make more for investors than a gas company converted into an independent regime.

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[14] By fostering competition between gas and electric utility companies, the Act promotes what has been described as "variegated competition." Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pt. 2, 840 (1965) (Statement of Dr. Samuel M. Loescher). "But since the distribution of electricity, following geographical divorcements, was to remain a natural monopoly in every region, the only kind of competition to be enhanced was that of 'variegated competition.'" *Ibid.*

[15] See, *e. g.*, Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st Sess., 1249, 1402–1403, 1530–1531, 2257–2277; Hearings before Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess., 65. It was only the loss of "*substantial* economies" that Congress thought would justify an exception from the separation rule of § 11.

The phrase "without the loss of substantial economies" is admittedly not crystal clear. But the Commission's construction seems to us to be well within the permissible range given to those who are charged with the task of giving an intricate statutory scheme practical sense and application. *Power Reactor Co.* v. *Electricians*, 367 U. S. 396, 408. And see *Philadelphia Co.* v. *SEC*, 177 F. 2d 720, 725.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 636.—October Term, 1965.

Securities and Exchange Commission, Petitioner, *v.* New England Electric System et al.	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[May 16, 1966.]

Mr. Justice Harlan, whom Mr. Justice Stewart joins, dissenting.

The question before the Court is the meaning of the phrase "loss of substantial economies" as it appears in § 11 (b)(1) of the Public Utility Holding Company Act of 1935.[1] The Court of Appeals ruled that the phrase "called for a business judgment of what would be a significant loss," 346 F. 2d, at 406, and I agree with this rendering which is both sensible and, in my view, obvious. This Court's opinion on the other hand seems to hold that the phrase demands a loss great enough to imperil "sound" corporate operations.[2] That holding, as I shall

[1] 49 Stat. 820, 15 U. S. C. § 79k (b)(1). This subsection provides that a holding company shall be limited to "a single integrated public-utility system," provided that the Commission shall permit control of additional systems if:

"(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

"(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

"(C) The continued combination of such systems under the control of such holding company is not so large (considering the state or the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation."

[2] I say "seems" to hold both because two statements in the opinion (*ante*, pp. 3, 8) emphasize a supposed offsetting economic saving to

indicate, is at odds with the Act's wording, has little basis in legitimate statutory history or the aims of the Act, and cannot be sustained by agency or judicial precedent.

Inquiry naturally begins with the language of the Act, and with our reiterated principle that "the words of statutes . . . should be interpreted where possible in their ordinary, everyday senses." *Crane* v. *Commissioner*, 331 U. S. 1, 6; *Malat* v. *Riddell*, 383 U. S. 569, 571. In this instance plainly the normal meaning of "substantial economies" is a significant amount of money and not that amount whatever its size which guarantees corporate survival. The first reading would be given by lawyers and laymen alike automatically while the second could hardly be imagined without the prompting of persuasive legislative evidence. If Congress had intended the Court's test to govern, it could easily have said so in shorter space and with far greater precision.[3] In addition, the Court's decision will apparently result in "substantial economies" being read its way in § 11 (b)(1) but in a quite different, more normal fashion where the same phrase appears in § 2 (a)(29)(B), defining an integrated gas utility system (see *ante*, n. 4, of the Court's opinion). None of this is to say that the many subtle choices to be made in deciding what is a substantial sum in the present context are dictated by the terse language of the Act. See *infra*, n. 11. The choice here, however, is between

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be found in divestiture and because the SEC has stated the test in this case in varying terms.

[3] This could in fact have been accomplished simply by chopping off the last half of the present, controlling clause (*supra*, n. 1), leaving the condition to read "each of such additional systems cannot be operated as an independent system" and omitting wholly the qualifying language which begins "without the loss of substantial economies."

two broad approaches, and the Act's language invites the first and repels the second.

If the natural reading produced some strange or arbitrary result there might be reason to hesitate; but in this case the literal reading makes excellent sense in serving the very rational and desirable end of financial economy. The Congress that passed the Act had been importantly concerned with the "intensification of economic power beyond the point of proved economies . . . ." H. R. Doc. No. 137, 74th Cong., 1st Sess., 4; see §§ 1 (b)(4), (5) of the Act, 15 U. S. C. §§ 79a (b)(4), (5) (policy statement), and the Act itself bristles with provisions aimed largely at attaining efficient management and operations. See §§ 7 (d)(3), 10 (c)(2), 12 (d), (f), (g), 13, 15 U. S. C. §§ 79g (d)(3), 79j (c)(2), 79*l* (d), (f), (g), 79m. With this background, nothing could be more plausible than to curtail divestiture at the point where the prospect of substantial losses removed a prime reason for having divestiture at all. There are to be sure other dangers in proliferated growth besides diseconomy, dangers which played their part in the passage of the Act, but there are also other clauses of § 11 (b)(1) whose conditions must be met before the exception is allowed (see *supra*, n. 1). In sum, it seems clear enough that the burden of persuasion rests upon those who would displace the Court of Appeals' interpretation.[4]

Legislative history and purpose, heavily relied on by the Court, furnish no reason for departing from the natural reading of the Act. There was very little direct explanation of the "substantial economies" provision in Congress; the majority opinion sets out in full the two

[4] "It . . . [is] wrong to deny the natural meaning of language its proper primacy; like Cardozo's 'Method of Philosophy,' it 'is the heir presumptive. A pretender to the title will have to fight his way.'" Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Felix Frankfurter: The Judge 40 (1964).

important statements, one by the House Conference Committee (*ante*, p. 4) and the other by Senator Wheeler (*ante*, pp. 4–5).[5] The Committee Report, highly authoritative but unilluminating, says merely that there must be "a real economic need" to justify retention of an additional system. Indisputably, substantial savings can be labeled a real economic need, the more so since Congress was sharply concerned with the lack of economic justification for many utility combinations. That the Committee's language is also compatible with the SEC's reading of "substantial economies" does no more than make that language a useless guidepost.

Senator Wheeler's statement by contrast does support if indeed it is not the source of the SEC interpretation, and normally the view of a principal sponsor of an Act carries heavy weight. Here, however, Senator Wheeler made his remarks *after* the bill had finally passed both Houses, and quite arguably "[t]he views of individual members of the legislature as to the meaning of a statute which were not officially communicated to the legislature prior to its enactment are not competent to be considered in determining the meaning which ought to be attributed to the statute." Hart and Sacks, The Legal Process 1285 (tent. ed. 1958). Moreover, in this instance Senator Wheeler had been a fierce opponent of allowing any exception at all to the one-system principle, see 346 F. 2d, at 403, and had excellent reason to minimize severely the scope of the present provision when to do so could no longer cost the Act votes. The SEC itself in its early days, before the elevation of the

[5] One other legislative comment on the provision favors the Commission, 79 Cong. Rec. 14165–14166 (remarks of Mr. Cooper), but the Court of Appeals properly disregarded it as an opponent's attempt to blacken the Act, see *Labor Board* v. *Fruit Packers*, 377 U. S. 58, 66, and the SEC no longer relies upon it in its brief.

Wheeler statement to its present exaggerated importance, took a far more guarded view of its worth.[6]

To support its construction of the "substantial economies" provision, the Court also relies on two general policies attributed to the Act as a whole. It is initially emphasized that the Act's overriding aim was to confine holding companies to a single integrated system while control of additional systems was to be "decidedly the exception" (*ante*, p. 3). The mild but misleading inference is that the "exception" is some minor, little noticed addendum, to be strictly construed. In truth, the original, more stringent version of § 11, popularly known as the "death sentence" provision, was bitterly opposed and the "A"–"B"–"C" clauses exception with Clause A of which we now deal (*supra*, n. 1) was adopted as a considered compromise between quite different House and Senate versions. See Ritchie, Integration of Public Utility Holding Companies 16–19, 151 (1954). The ABC clauses represent part of the price openly paid for enactment, and there is no basis in these events for a grudging interpretation.[7]

Far more weight is given by the Court's opinion to the Act's supposed hostility toward common control of gas

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[6] The statement was quoted as cumulative, minor evidence on another matter in 1941, the SEC admitting that it "may not strictly be considered part of the legislative history" but saying it deserved "some consideration." *Engineers Pub. Serv. Co.*, 9 S. E. C. 764, 783–784. In 1942, it was quoted as bearing on the present question but its test was not adopted. *North American Co.*, 11 S. E. C. 194, 209. The following year the statement was thought to reveal "one" of the various criteria to be used along with others. *Cities Serv. Power & Light Co.*, 14 S. E. C. 28, 62.

[7] For its "decidedly the exception" characterization, the Court cites (*ante*, p. 3, n. 8) *North American Co.* v. *SEC*, 327 U. S. 686. That decision imparted no such gloss to the ABC clauses but was giving a most cursory summary in passing on the constitutionality of § 11 (b) (1).

and electric utility systems with its danger of stifled competition. First of all, this hostility appears to be an illusion. The House and Senate Committees in identical language expressly stated that common ownership of competing forms of energy was "a field which is essentially a question of State policy"; the present § 8, 15 U. S. C. § 79h, was enacted to support this approach by using federal power to limit common ownership only where it is contrary to state law. See S. Rep. No. 621, 74th Cong., 1st Sess., 29–30; H. R. Rep. No. 1318, 74th Cong., 1st Sess., 14–15.[8] In its decision in this very case the SEC stated: "We do not take the view that the Act expresses a federal policy against combined gas and electric operations as such." Holding Co. Act Release No. 15035, p. 15. This was apparently so clear at the time the Act passed that in an early and now-repudiated decision the SEC went so far as to hold that gas and electric companies could be combined in the *same* single

[8] The Court's opinion (*ante*, p. 7, n. 13) quotes from p. 7 of the above cited Senate report, borrowing from it language that suggests § 11 was forwarding the same policy as § 8. What the Court overlooks is that this discussion was directed to an earlier and very different version of § 8, in which it also embodied other restrictions on holding company ownership having nothing to do with common control of gas and electricity but closely related to § 11's policy of federally imposed simplification. A reading of the Court's quotation in context along with the relevant version of S. 2796, 74th Cong., 1st Sess., §§ 8, 11 (as reported on May 13, 1935) will quickly show that its reliance is misplaced. The majority's other citations in the same footnote are also infirm. The first two citations are statements on behalf of the rule that is now § 8, which allows the States to decide the issue. The remaining citation to the Senate Hearings does indeed reveal one Senator's general concern with common ownership's impact on competition; the respondent states it is "the only such reference in the entire Senate hearing." Brief, p. 37, n. 45.

integrated public utility system. *American Water Works & Elec. Co.*, 2 S. E. C. 972 (1937).

Furthermore, a constricted reading of the "substantial economies" provision is a quite unsuitable way of responding to the dangers in common ownership of competing types of utilities. The provision is equally intended to govern common control of two or more gas systems or two or more electric systems and, at least in the abstract, the Court's reading will hinder those arrangements as well though its rationale is irrelevant to them. If the SEC is prepared to show that freeing a gas system from control by an electric system will improve earnings by some amount, then this may be a legitimate offset to the losses that can be shown, and there is leeway for rough calculations and for estimates based on studying past separations. See Ritchie, Integration of Public Utility Holding Companies, 143–147 (1954). But to dispense with proof and disregard the basic test of "substantial economies" is to undo Congress' own careful compromise of the various conflicting policy interests.[9]

There remains to be answered only the Court's claim that its reading of the statute is "supported by consistent administrative practice" (*ante*, p. 6, n. 11). Analysis of the SEC decisions shows that the Court is mistaken.

[9] It should again be remembered also that the present provision is not the only legislative safeguard. Even to obtain ownership over two systems, a holding company must, along with proving "substantial economies," show that there is geographical unity and that the combination is not so large as to impair "the advantages of localized management, efficient operation, or the effectiveness of regulation" (*supra*, n. 1). Section 8 (*supra*, p. 6) acts as a further restraint in some cases. Other sections of the Act regulate transactions between utility companies and require disclosure of reports and maintenance of accounting data and other records. §§ 12 (f), 13 (a), 14, 15, 15 U. S. C. §§ 79*l* (f), 79m (a), 79n, 79*o*.

The first important construction of "substantial economies" came in *North American Co.*, 11 S. E. C. 194, decided in 1942 only several years after the Act took effect. Rejecting the assertion that any saving beyond a wholly nominal one would do, the SEC stated: "The normal and usual meaning of the word 'substantial' is a meaning connoting 'important.' And we think that this normal and usual meaning is compelled here." *Id.*, at 209. At least four subsequent decisions cite *North American* and adopt its "importance" test, a natural reading of the Act rather than the unusual and specialized one adopted today. *Cities Serv. Power & Light Co.*, 14 S. E. C. 28, 37 (1943); *Middle West Corp.*, 15 S. E. C. 309, 319 (1944); *Cities Serv. Co.*, 15 S. E. C. 962, 984 (1944); *American Gas & Elec. Co.*, 21 S. E. C. 575, 597 (1945). Also during this first decade of the Act's enforcement two decisions, including one just cited, said that inability to operate independently was "one of the guides which (among others) Congress intended to be used . . . ." *Cities Serv. Power & Light Co.*, 14 S. E. C. 28, 62 (1943); *Commonwealth & Southern Corp.*, 26 S. E. C. 464, 489 (1947). In one other case the SEC stated the loss must be one which would "seriously impair . . . effective operations." *Engineers Pub. Serv. Co.*, 12 S. E. C. 41, 61 (1942).

The majority opinion says that the respondent "concedes" that the Commission has since 1948 articulated its present test, and three SEC decisions are then cited (*ante*, p. 5, n. 11). But with the *Engineers* case just cited as a possible addition, these are the only three decisions until the present one to state the Court's test out of the 15 or more decisions applying § 11 (b)(1), taking the ones already mentioned with those that established no test. Furthermore, the respondent asserts that the three SEC decisions stating its present test involved a very small percentage of the assets it has divested, and

even in those three cases it is not clear that the test was determinative. Brief, pp. 47–48. In sum, whether or not the SEC's early decisions may be said actually to refute the test now urged, certainly there is no consistent administrative practice lending it any real weight. Before leaving precedent, it should also be noted that the First and Fifth Circuits have squarely rejected the SEC's present interpretation and that the Second Circuit has approved its "importance" gloss, while only the District of Columbia Circuit has upheld the present reading.[10]

To conclude, I think it should be noted that the Court's departure from the statute is not just an abstract legal error but does immediate, tangible harm in a most practical sense. The annual losses which respondent has forecast for its gas system because of separation exceed $1,000,000, a figure the SEC has questioned in part but not yet properly considered. The respondent's analysis also shows annual losses of $800,000 for the electrical system, although the SEC deems irrelevant losses to the primary system and the Court of Appeals did not reach this issue. The heavy losses in this case will presumably be borne by investors and consumers if the figures are accurate and separation occurs; it is noteworthy that the Massachusetts Department of Public Utilities appeared at the hearings in this case to oppose divestiture. The SEC has wide latitude in deciding how to gauge and compute "substantial economies" and it has used that

[10] The Fifth Circuit case is *Louisiana Pub. Serv. Comm'n* v. *SEC*, 235 F. 2d 167. It was reversed here on jurisdictional grounds, 353 U. S. 368, which does not of course impair its statement on the merits. The Second Circuit decision is *North American Co.* v. *SEC*, 133 F. 2d 148, aff'd on constitutional questions, 327 U. S. 686. The District of Columbia decision is *Philadelphia Co.* v. *SEC*, 177 F. 2d 720; that court thought it was following its earlier two-to-one decision in *Engineers Pub. Serv. Co.* v. *SEC*, 138 F. 2d 936, cert. granted, 322 U. S. 723, vacated as moot, 332 U. S. 788, but *Engineers* is ambiguous.

freedom in the past.[11] What the Commission has no right to do, however, is to substitute to the detriment of business interests and the public alike a quite different standard for the one enacted by Congress. Neither does this Court have that right. I would affirm the Court of Appeals' well considered decision.

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[11] Among examples—and I do not mean to approve or disapprove the ones I cite—are SEC rulings that as noted it will not consider losses to the principal system, *General Pub. Utils. Corp.*, 32 S. E. C. 807, 838–839 (1951); that it will not consider tax losses as a very significant factor, *Cities Serv. Co.*, 15 S. E. C. 962, 985 (1944); that it will give only limited weight to capital costs of divestiture, *Eastern Utils. Associates*, 31 S. E. C. 329, 349 (1950); and that it will offset predicted gains resulting from separation against the losses, *North American Co.*, 18 S. E. C. 611 (1945).